Supreme Court, U.S.
FILED
01-688 NOV 8 2001
OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

URSULA GIBSON, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

STEVEN B. HANTLER
ALLAN M. HUSS
MARY E. WALDRUP
DAIMLERCHRYSLER CORP.
1000 Chrysler Drive
Auburn Hills, MI 48326

JEFFREY S. SUTTON
(*Counsel of Record*)
MICHAEL S. FRIED
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215

Counsel for Petitioner

116 pp

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1367 authorizes federal courts to exercise supplemental jurisdiction over the claims of class members who do not satisfy the amount-in-controversy requirement, when at least some members of the class (whether named or unnamed) satisfy the $75,000 diversity threshold?

2. Whether, in calculating the amount in controversy, punitive damages should be divided pro rata among all class members (whether named or unnamed), divided pro rata among named class members, or treated as an undivided whole attributable to each class member?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption and to the unidentified class members, Mary Depina, Paul Maldonado, and Stephen Depalma are parties to the case.

CORPORATE DISCLOSURE STATEMENT

DaimlerChrysler Corporation is a wholly-owned subsidiary of DaimlerChrysler North American Holdings, Inc., which in turn is a wholly-owned subsidiary of DaimlerChrysler AG, a German Stock Corporation. The shares of DaimlerChrysler AG are publicly traded.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 8

I. THE COURT SHOULD DECIDE WHETHER FEDERAL COURTS MAY EXERCISE SUPPLEMENTAL JURISDICTION OVER CLASS MEMBERS WHO DO NOT SATISFY THE $75,000 REQUIREMENT WHEN SOME CLASS MEMBERS DO. 8

A. The Ninth Circuit's Decision Deepens An Existing Division of Lower-Court Authority ... 8

B. The Split Involves An Important And Recurring Issue 13

C. The Ninth Circuit Misconstrued Section 1367 15

TABLE OF CONTENTS (cont'd)

Page

II. THE COURT SHOULD DECIDE HOW PUNITIVE DAMAGES ARE TREATED IN ASCERTAINING THE AMOUNT IN CONTROVERSY. 20

A. The Treatment of Punitive Damages Is An Important And Recurring Issue That Has Generated Confusion In The Federal Courts .. 20

B. The Ninth Circuit Misinterpreted *Snyder v. Harris*, 394 U.S. 332 (1969), In Addressing This Issue 23

III. THE RESOLUTION OF THESE QUESTIONS WILL ALLOW DISTRICT COURTS TO RESOLVE MOST (IF NOT ALL) AMOUNT-IN-CONTROVERSY DISPUTES THROUGH JURISDICTIONAL DISCOVERY 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

ABS Ins., Ltd. v. Nat'l Union Fire Ins. Co., 51 F. Supp. 2d 762 (E.D. Tex. 1999) 22
In re Abbott Labs., 51 F.3d 524 (5th Cir. 1995), *aff'd sub nom Free v. Abbott Labs. by evenly divided Court*, 529 U.S. 333 (2000) 9
Adams v. Murakami, 54 Cal. 3d 105 (1991) 26
Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) 20, 21, 27
Allendale Mut. Ins. Co. v. Excess Ins.Co., 62 F. Supp. 2d 1116 (S.D.N.Y. 1999) 13
Amundson & Assocs. Art Studio, Ltd. v. Nat'l Council on Compensation Ins., Inc., 977 F. Supp. 1116 (D. Kan. 1997) 12
Anthony v. Sec. Pac. Fin. Servs., Inc., 75 F.3d 311 (7th Cir. 1996) 22
Ard v. Transcon. Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998) 21
Arias v. Am. Airlines, Inc., __ F. Supp. 2d __, No. 01-1380, 2001 WL 1148131 (D.P.R. Aug. 27, 2001) 13
Averdick v. Republic Fin. Serv., Inc., 803 F. Supp. 37 (E.D. Ky. 1992) 14
Benfield v. Mocatta Metals Corp., No. 91 Civ. 8255, 1993 WL 148978 (S.D.N.Y. May 5, 1993) .. 14
Bernard v. Gerber Food Prods. Co., 938 F. Supp. 218 (S.D.N.Y. 1996) 14
Blair v. Source One Mortgage Servs. Corp., 925 F. Supp. 617 (D. Minn. 1996) 14
Borgeson v. Archer-Daniels Midland Co., 909 F. Supp. 709 (C.D. Cal. 1995) 14
In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997) 9, 12

TABLE OF AUTHORITIES (cont'd)

Page

Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152 (2d Cir. 1996) 27
Casteel v. Sara Lee Crop., 51 F. Supp. 2d 816 (E.D. Mich. 1999) 13
Chiartas v. Bavarian Motors Works AG, 106 F. Supp. 2d 872 (S.D.W.Va. 2000) 12
In re Ciprofloxacin Hydrochloride Antitrust Litig., No. MDL-00-1383 (DGT), 2001 WL 150405 (E.D.N.Y. Oct. 1, 2001) 13
City & County of San Francisco v. Hartford Life Ins. Co., No. C 99-0225 CRB ARB, 1999 WL 354522 (N.D. Cal. May 17, 1999) 13
Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000) 21
Crawford v. F. Hoffman-La Roche Ltd., No. 00-2951, 2001 WL 1160354 (8th Cir. Oct. 3, 2001) 21
Crosby v. Am. Online, Inc., 967 F. Supp. 257 (N.D. Ohio 1997) 14
Daniels v. Philip Morris Cos., 18 F. Supp. 2d 1110 (S.D. Cal. 1998) 14
Davies v. Belden & Blake Corp., No. 00-CV-0245E(F), 2001 WL 210471 (W.D.N.Y. Feb. 20, 2001) 12
Delos v. Farmers Group, Inc., 93 Cal. App. 3d 642 (1979) 25
Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54 (D. Mass. 1997) 14
Durant v. Serv. Master Co., 147 F. Supp. 2d 744 (E.D. Mich. 2001) 22
Free v. Abbott Labs., Inc., 529 U.S. 333 (2000) ..... *passim*

TABLE OF AUTHORITIES (cont'd)

Page

Gilman v. BHC Secs., Inc., 104 F.3d 1418 (2d Cir. 1997) 21
Gilmer v. Walt Disney Co., 915 F. Supp. 1001 (W.D. Ark. 1996) 14
H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc., 227 F.3d 326 (5th Cir. 2000) ... 21
Hairston v. Home Loan & Inv. Bank, 814 F. Supp. 180 (D. Mass. 1993) 14
Harmon v. OKI Sys., 115 F.3d 477 (7th Cir. 1997) 27
Howard v. Globe Life Ins. Co., 973 F. Supp. 1412 (N.D. Fla. 1996) 14
Jerome B. Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 15
Kanter v. Warner-Lambert Co., 52 F. Supp. 2d 1126 (N.D. Cal. 1999) 13
Knaver v. Ohio State Life Ins. Co., 102 F. Supp. 2d 443 (N.D. Ohio 2000) 22
Lauchheimer v. Gulf Oil, 6 F. Supp. 2d 339 (D.N.J. 1998) 22
Leonhardt v. W. Sugar Co., 160 F.3d 631 (10th Cir. 1998) 10
Leszczynski v. Allianz Ins., 176 F.R.D. 659 (S.D. Fla. 1997) 14
Lindsey v. Alabama Tel. Co., 576 F.2d 593 (5th Cir. 1978) 21
Majd-Pour v. Georgiana Comm. Hosp., Inc., 724 F.2d 901 (11th Cir. 1984) 27
Martin v. Franklin Capital Corp., 251 F.3d 1284 (10th Cir. 2001) 21
Mattingly v. Hughes Elec. Corp., 107 F. Supp. 2d 694 (D. Md. 2000) 22
Mayo v. Key Fin. Serv., Inc., 812 F. Supp. 277 (D. Mass. 1993) 14

TABLE OF AUTHORITIES (cont'd)

Page

McGowan v. Cadbury Schweppes, PLC, 941 F. Supp. 344 (S.D.N.Y. 1996) 14
Medley v. Am. Int'l Ins. Co., No. 01-3735, 2001 WL 892793 (E.D. Pa. 2001) 22
Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999) 10
Morrison v. Allstate Indem. Co., 228 F.3d 1255 (11th Cir. 2000) 6, 11, 12
Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980) 2, 15
Neiderhiser v. Berwick, 840 F.2d 213 (3d Cir. 1988) 27
Olden v. Lafarge Corp., No. 99-10176-BC, 2001 WL 1295415 (E.D. Mich. Oct. 24, 2001) 13
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) .. 24
Phillips v. Allegheny County, Pennsylvania, 869 F.2d 234 (3d Cir. 1970) 19
Poore v. Am.-Amicable Life Ins. Co. of Tex., 125 F. Supp. 2d 1378 (S.D. Ga. 2000) 12
In re Potash Antitrust Litig., 866 F. Supp. 406 (D. Minn. 1994) 14
Prakash v. Am. Univ., 727 F.2d 1174 (D.C. Cir. 1984) .. 27
Robinson v. Computer Learning Ctrs., No. 99-3904, 1999 WL 817745 (E.D. Pa. 1999) 22
Rosmer v. Pfizer Inc., 263 F.3d 110 (4th Cir. 2001) 9
Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808 (E.D. Pa. 1997) 14
Shannon v. United States, 512 U.S. 573 (1994) 17
Shelly v. S. Bell Tel. & Tel. Co., 873 F. Supp. 613 (M.D. Ala. 1995) 14
Snider v. Stimson Lumber Co., 914 F. Supp. 388 (E.D. Cal. 1996) 14
Synder v. Harris, 394 U.S. 332 (1969) 23-25

TABLE OF AUTHORITIES (cont'd)

Page

Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928 (7th Cir. 1996) 9
Trimble v. Asarco, Inc., 232 F.3d 946 (8th Cir. 2000) ... 10
Universal Jewelry & Watch Repair, Inc. v. United Parcel Serv., Inc., No. 99-70016, 1999 U.S. Dist. LEXIS 5957 (E.D. Mich. Apr. 12, 1999) 13-14
Waters v. Grosfeld, 904 F. Supp. 616 (E.D. Mich. 1995) 14
Weeks v. Baker & McKenzie, 63 Cal. App. 4th 1128 (1998) 24
Whelan v. Rallo, 52 Cal. App. 4th 989 (1997) 24
Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) ..... *passim*

Statutes & Rules

28 U.S.C. § 1367. ..... *passim*
28 U.S.C. § 1446 (b). 4
28 U.S.C. § 1447 ..... *passim*
Iowa Code Ann. § 668A.1(2)(b) 24
Mo. Ann. Stat. § 537.675(2) 24
Or. Rev. Stat. § 18.540 24
Utah Code Ann. § 78-18-1(3) 24

Miscellaneous

H.R. Rep. No. 101-734 (Sept. 10, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6860 17
Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 Emory L.J. 963 (1991) . 11, 13

TABLE OF AUTHORITIES (cont'd)

Page

Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 Seton Hall Legis. J. 157 (1994) 10

Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445 (1991) 11

Robert H. Klonoff & Edward K.M. Bilich, *Class Actions* (2000) 10

Thomas M. Mengler, *et al.*, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Juricature 213 (1991) 10

5 James Wm. Moore, *et al.*, *Moore's Federal Practice* (3d ed. 1998) 10

2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 10

Thomas D. Rowe, Jr., *et al.*, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943 (1991) 11

Christopher J. Willis, *Aggregation of Punitive Damages in Diversity Class Actions: Will The Real Amount In Controversy Please Stand Up?*, 30 Loy. L.A.L. Rev. 775 (1997) 25

Charles Alan Wright, *et al.*, *Federal Practice & Procedure* (2d ed. 1986) 10, 19

INTRODUCTION

Two years ago, the Court attempted to resolve one of the questions presented here: Does 28 U.S.C. § 1367 supersede the requirement of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that all members of a Rule 23 diversity class, rather than just some, must meet the $75,000 amount-in-controversy threshold? *Free v. Abbott Labs., Inc.*, 528 U.S. 1018 (1999). After briefing and oral argument, however, the Court affirmed the lower-court decision by a 4-4 vote. 529 U.S. 333 (2000). The urgency of resolving the *Zahn*/1367 conflict has not diminished since. Two additional circuits, including the Ninth Circuit in this case, have weighed in on the issue, with four circuits now holding that section 1367 supersedes *Zahn* and three circuits now holding that it does not. The issue is plainly ripe for review, is directly presented in this case, and again deserves the Court's time.

Not only does the petition present an opportunity to lay this lingering question to rest, but it also raises two connected class-action questions that have preoccupied the lower courts over the last decade. First, in determining whether the amount-in-controversy requirement has been satisfied, should a court look solely to the members of the class named in the complaint or may it look to unnamed (but subsequently identified) class members to satisfy this requirement? Second, in deciding whether an individual class member meets the $75,000 requirement, how are claims for punitive damages treated — are they divided among all potential class members, divided solely among the named parties, or aggregated and attributed to each class member?

Along with the *Zahn*/1367 issue, these questions have provoked a remarkable volume of lower-court litigation and a diverse range of views. Because these questions often evade appellate review (to say nothing of review by this Court), *see* 28 U.S.C. § 1447(d), and because needless litigation devoted solely to determining what is the "right court" for airing a

dispute "is essentially a waste of time and resources," *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980), the Court should grant the petition to resolve these pressing questions.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-38a) is reported at 261 F.3d 927. The opinions of the district court (Pet. App. 39a-65a & Pet. App. 67a-76a) are not reported.

JURISDICTION

The court of appeals entered judgment (Pet. App. 1a) on August 20, 2001. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1367 of Title 28, United States Code, provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when

exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

STATEMENT

This case began when plaintiffs filed three class actions against DaimlerChrysler Corporation in California state court, all stemming from a dispute over the quality of the exterior paint on some of its vehicles. In each complaint, plaintiffs sought damages and attorney fees on behalf of a statewide class consisting of thousands of owners of Chrysler, Dodge and Plymouth vehicles. The case was one of many identical actions filed by the same lawyers in state courts throughout the country against not only DaimlerChrysler but also Ford Motor Company and General Motors Corporation.

As with the vast majority of these serial complaints, DaimlerChrysler removed the three California actions to federal court (specifically, the United States District Court for the Northern District of California) on the basis of diversity. The removal notices alleged complete diversity and an amount

in controversy exceeding $75,000 for at least one relevant plaintiff. Invoking 28 U.S.C. § 1367(a), DaimlerChrysler contended that the district court could exercise supplemental jurisdiction over class members who did not meet the jurisdictional minimum as long as the court had jurisdiction over some of the claims. At the same time that the company removed these cases, it asked the district court for leave to serve limited discovery requests on plaintiffs to confirm the amount in controversy. The district court denied leave to conduct discovery, plaintiffs refused to answer the discovery requests voluntarily, and the court remanded the case to state court. In doing so, the district court squarely rejected the company's argument that section 1367 supersedes the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that all class members must meet the jurisdictional threshold.

After remand, plaintiffs consolidated the actions and filed a single amended complaint in state court, which added a claim authorizing punitive damages. Soon thereafter, DaimlerChrysler again served limited jurisdictional discovery on plaintiffs. The company sought to eliminate any doubt about the amount in controversy by asking plaintiffs either to waive some of their requests for damages and attorney fees or to stipulate that they did not seek recovery in excess of $75,000 for any plaintiff. Plaintiffs declined to respond, and the state court refused to grant DaimlerChrysler's emergency request to compel a response. Confronted with the one-year deadline for removal of diversity cases under 28 U.S.C. § 1446(b), DaimlerChrysler thus again removed the case to federal court on May 5, 1999, one day before the impending deadline. Once again, it asked the district court to order plaintiffs to respond to jurisdictional discovery or, failing that, to deem the requests for admission admitted in view of plaintiffs' refusal to answer.

In response, plaintiffs moved for remand, for sanctions under Rule 11, and for attorney fees under 28 U.S.C. §1447(c).

The district court concluded that DaimlerChrysler still had not established the requisite amount in controversy for diversity jurisdiction because *Zahn* controlled the inquiry and because DaimlerChrysler had not alleged that *all* plaintiffs satisfied the $75,000 requirement. Pet. App. 46a-51a. At the same time, the court concluded that punitive damages in a class action had to be attributed pro rata to all named and unnamed plaintiffs for purposes of calculating the amount in controversy. Pet. App. 51a-55a. Next, the court imposed $1,500 in Rule 11 sanctions, and ordered the company to pay $28,500 in attorney fees under 28 U.S.C. § 1447(c) because the second removal was "frivolous in light of this court's July 20 Order and the decisions of other courts in the Ninth Circuit." Pet. App. 61a-65a.

The Ninth Circuit affirmed in part and reversed in part. Recognizing that "review of a fee award under section 1447(c) 'must include a de novo examination of whether the remand order was legally correct,'" Pet. App. 6a (quoting *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000)), the court first considered whether section 1367 provided the district court with original jurisdiction over the claims of plaintiffs who satisfied the amount-in-controversy requirement and supplemental jurisdiction over the remaining claims. In doing so, the court acknowledged that the issue had generated a "split" in the lower courts and that this Court had tried unsuccessfully to resolve the question in *Abbott Laboratories*. Pet. App. 17a.

After an extensive analysis of the competing arguments, the Ninth Circuit sided with the courts concluding that section 1367 abrogates *Zahn*. In implementing that decision, however, the court determined that only the claims of *named*, as opposed to *unnamed*, plaintiffs count when it comes to identifying a claimant that satisfies the $75,000 jurisdictional minimum. While the court accepted DaimlerChrysler's evidence that sixty unnamed class members had claims valued over $75,000,

it still concluded that "'original jurisdiction does not refer to jurisdiction over claims not made — or not yet made — in the complaint," but only includes the "claims of the named" plaintiffs. Pet. App. 20a.

Notwithstanding this distinction between named and unnamed class members, the court refused to accept DaimlerChrysler's argument that, if only named plaintiffs matter in ascertaining the amount in controversy, the punitive-damages claims should all be attributed solely to the named plaintiffs. The court also rejected the company's alternative argument that plaintiffs' punitive-damages claim should be treated as indivisible and attributed to each plaintiff in determining the amount in controversy. As the court appreciated, "the distinction between 'separate and distinct' claims which cannot be aggregated, and 'common and undivided' claims which can, is not always crystal-clear." Pet. App. 26a (quoting *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000) (noting criticism of distinction as "arcane and confusing")). And it also recognized that "punitive damages are different in some respects from compensatory damages." Pet. App. 30a. But because punitive damages do not amount to a claim that "there is some unitary res to which the plaintiffs jointly claim a right," and because "a party cannot show that claims are 'common and undivided' simply by showing that the success of one plaintiff's individual claim would affect the recovery of another," it refused to aggregate the claims. Pet. App. 31a. "Other circuits," the court acknowledged, "have in the past been willing to aggregate punitive damage claims for purposes of determining the amount in controversy," because punitive damage awards in those States "could be characterized as fundamentally collective." Pet. App. 31a-32a (citing *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996), and *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995)). But the court disagreed with these precedents and at any rate concluded that later decisions from the Fifth

and Eleventh Circuits "appear to" have cut back on those rulings. Pet. App. 31a-32a.

Lastly, the court reversed the Rule 11 sanction award and affirmed the attorney-fee award under section 1447(c). As to the sanction award, it "recognize[d] the difficulties faced by parties who seek to advance novel legal arguments in opposition to remand. Because of the general bar upon direct appellate review of district court remand orders, *see* 28 U.S.C. § 1447(d), Chrysler was forced either to abide by the district court's view of the law without an authoritative ruling from this circuit, or to risk sanctions by reiterating its arguments." Pet. App. 36a. As a result, the court concluded that "sanctioning a defendant for making (or even repeating) a plausible argument that has failed previously in district court when the failure to make (or to repeat) that argument will potentially have the consequence of depriving the defendant of a favorable ruling from an appellate court is not an appropriate use of the sanction power." Pet. App. 37a.

In affirming the attorney-fee award under section 1447(c), the court noted that the issue was not one of bad faith, but rather of whether the remand order was correct. It "must reverse an award of attorneys' fees," the court concluded, "if the district court's exercise of discretion was grounded in a determination of law that we reject." Pet. App. 37a-38a (internal quotation marks omitted). But since the Ninth Circuit rejected only the district court's resolution of the *Zahn*/1367 issue and since that interpretation did not result in a "determination that the remand order was incorrect" in view of the court of appeals' refusal to look at unnamed class members, the court affirmed the award.

REASONS FOR GRANTING THE WRIT

Remarkably, litigation of this stripe is not unique. One lower court after another has found uncertainty in this area when by now there ought to be clarity, and parties have been forced repeatedly to litigate these issues anew in district courts throughout the country. In an age when the meek and brazen alike are calling on the courts to resolve all manner of social, political and business disputes, it is difficult to perceive the virtue of allowing this uncertainty to persist — particularly when it comes to a litigation device (the class action) that all agree was designed to eliminate rather than further unnecessary litigation. Add to this the fact that these questions affect the day-to-day functioning of all state and federal lower courts, and it becomes clear that guidance from this Court is needed sooner rather than later. Because this case presents a vehicle to resolve both the *Zahn*/1367 issue and several related amount-in-controversy questions and because these questions frequently evade appellate review, the Court should grant the writ.

I. THE COURT SHOULD DECIDE WHETHER FEDERAL COURTS MAY EXERCISE SUPPLEMENTAL JURISDICTION OVER CLASS MEMBERS WHO DO NOT SATISFY THE $75,000 REQUIREMENT WHEN SOME CLASS MEMBERS DO.

A. The Ninth Circuit's Decision Deepens An Existing Division of Lower-Court Authority.

The Ninth Circuit was assuredly correct in at least one respect regarding this case. In recognizing a multi-circuit split of authority over whether section 1367 abrogates *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the court correctly sized up the lower-court record. This division of authority by itself warrants review.

Zahn held that each putative member of a state-court class action independently must satisfy the amount-in-controversy requirement before a federal court may exercise removal jurisdiction over the case. *Id.* at 300. After *Zahn*, however, Congress in 1990 enacted section 1367, which allows "supplemental jurisdiction over all other claims that are so related to claims in the action within [which the court has original jurisdiction] that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). Since 1990, seven appellate courts have issued thoughtful — and ultimately conflicting — decisions regarding the continuing vitality of *Zahn*.

On one side of the conflict are the Fourth, Fifth and Seventh Circuits. Relying on the plain text of the amendment, they each have held that the amendments to section 1367 abrogate *Zahn*. *See In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (holding that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement"), *aff'd sub nom. Free v. Abbott Labs. by evenly divided Court*, 529 U.S. 333 (2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997) (expressing "agreement with" the Fifth Circuit's holding in *Abbott Laboratories*); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930 (7th Cir. 1996) ("We follow *Abbott Laboratories*, which has strong support from the statutory text."); *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 118 (4th Cir. 2001) ("agree[ing]" with the Fifth and Seventh Circuits and holding that "section 1367 plainly does not require that *all* class members must independently meet the amount in controversy requirement of section 1332").

On the other side of this debate are the Third, Eighth, and Tenth Circuits. Notwithstanding the passage of section 1367, they maintain that *Zahn* still controls and accordingly that *each* putative class member must satisfy the jurisdictional minimum

in order to support removal jurisdiction. *See Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) (section 1367 "require[s] each plaintiff in a class action diversity case to satisfy the *Zahn* definition of 'matter in controversy' and to individually meet the $75,000 requirement"); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 222 (3d Cir. 1999) (section 1367 "preserves the prohibition against aggregation outlined in" *Zahn*); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) ("the rule of *Zahn* remains viable notwithstanding Congress's enactment of § 1367").

Not surprisingly, in light of this wide range of judicial views, the leading treatises also have failed to agree about the meaning of section 1367. *Compare* 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 23.07[3][c] (3d ed. 1998) ("The conclusion that *Zahn* remains good law is ultimately unconvincing"); *and* 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 6.11 (3d ed. 1992) ("The Act's probable overruling of *Zahn* is fully consistent with the reasoning of the Federal Courts Study Committee on whose recommendation the Act was adopted."); *with* 13 Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 3523.1 (1999 Supp.) ("The omission of any debate in the statute's history on the merits of this important change . . . makes the omission of Rule 23 from Section 1367(b) seem more like an inadvertent mistake than a purposeful policy choice by Congress."). *See also* Robert H. Klonoff & Edward K.M. Bilich, *Class Actions* 475, 484 (2000) (noting the division of lower-court authority).

Nor have law review authors been of one mind about the issue. *See, e.g.*, Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 Seton Hall Legis. J. 157 (1994); Thomas M. Mengler, *et al.*, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 (1991) (stating that "the Supreme Court's holdings that . . . all class members must satisfy the amount in

controversy requirement remain good decisional law."); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 471 (1991) (concluding that "the statutory language overrules *Zahn*"); Thomas D. Rowe, Jr., *et al.*, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 944-45 (1991) ("Professor Richard Freer purports to separate the wheat from the chaff and then proceeds to torch the farm."); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 Emory L.J. 963, 963 (1991).

Against this backdrop, the Ninth Circuit attempted to adopt a hybrid approach. On the one hand, the court concluded that *Zahn* "is overruled by § 1367" and that federal courts have supplemental jurisdiction over claims valued at less than $75,000. Pet. App. 8a. On the other hand, it eviscerated the impact of this conclusion by maintaining that only the claims of *named* class members may trigger supplemental jurisdiction under section 1367. Pet. App. 19a-21a. In reaching this result, the Ninth Circuit rejected DaimlerChrysler's argument that the overruling of *Zahn* necessarily permitted federal courts to rely on the claims of named *or* unnamed class members in determining whether the amount-in-controversy requirement had been satisfied. Otherwise, the company had argued, savvy counsel would simply name class representatives with claims below the jurisdictional amount, a practice that would spur gerrymandered pleading and that would render the conclusion that section 1367 overrules *Zahn* an empty and utterly inconsequential formality. Nonetheless, the Ninth Circuit disagreed.

Other courts have not embraced this interpretation. In particular, in *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1271-72 (11th Cir. 2000), the Eleventh Circuit reversed

a dismissal on the merits of a putative class action filed by plaintiffs in federal court. In doing so the court addressed the question of jurisdiction, *id.* at 1258, and expressly agreed that jurisdiction could be founded on the claims of unnamed class members if *Zahn* was overruled by section 1367. *See id.* at 1273-74 (holding that if there are any "other class members who may make a 'good faith' allegation that they have incurred close to $75,000 in damages," then "the issue of whether 28 U.S.C. § 1367 overruled the *Zahn* decision will be presented for decision" (citation omitted)). The court therefore remanded the case to allow the plaintiffs "an opportunity to make that showing." *Id.* at 1273.

Morrison thus expressly disagreed with the Ninth Circuit's distinction between named and unnamed class members in the context of supplemental jurisdiction under section 1367. In addition to the Ninth Circuit, the Seventh Circuit has disagreed with the principle articulated in *Morisson*. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d at 607. The district courts are also in disagreement on the question. *Compare, e.g.*, *Chiartas v. Bavarian Motor Works AG*, 106 F. Supp. 2d 872, 874 (S.D.W. Va. 2000) (the overruling of *Zahn* allows "any potential class member" meeting the jurisdictional threshold to serve as the basis for supplemental jurisdiction under section 1367), *with Davies v. Belden & Blake Corp.*, No. 00-CV-0245E(F), 2001 WL 210471, at *3 (W.D.N.Y. Feb. 20, 2001) (indicating that named class member meeting the jurisdictional minimum would be necessary); *Poore v. Am.-Amicable Life Ins. Co. of Tex.*, 125 F. Supp. 2d 1378, 1383 (S.D. Ga. 2000) (same); *Amundson & Assocs. Art Studio Ltd. v. Nat'l Council on Compensation Ins., Inc.*, 977 F. Supp. 1116, 1123 (D. Kan. 1997) (same); *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947, 961 (D. Del. 1997) (same); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 299 (D.N.J. 1996) (same).

In the end, whether one looks to the initial question whether section 1367 overrules *Zahn* or to the interrelated question whether the claims of unnamed class members may trigger supplemental jurisdiction, the conclusion is the same: The lower courts and commentators are hopelessly conflicted over the meaning of section 1367. For that reason, as one writer has implored, "it will take a Supreme Court decision to straighten out this mess." Arthur & Freer, *supra*, at 981 n.2. Even under the most forbearing application of the lower-court conflict considerations of Rule 10, this issue is ripe for review.

B. The Split Involves An Important And Recurring Issue.

This express and irreconcilable division of opinion concerns a matter important to the daily functioning of the lower courts and accordingly concerns an issue that deserves the Court's attention for this reason alone. For one, the confusion generated by this uncertainty has led to an uncommon number of collateral disputes over where, not how, a matter ought to be decided. Indeed, district court judges who have yet to face these issues represent the exception, not the rule, as the following non-exhaustive listing of representative lower-court decisions confirms. *See, e.g.*, *Olden v. Lafarge Corp.*, No. 99-10176-BC, 2001 WL 1295415, at *5 (E.D. Mich. Oct. 24, 2001); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, No. MDL-00-1383 (DGT), 2001 WL 150405, at *12 (E.D.N.Y. Oct. 1, 2001); *Arias v. Am. Airlines, Inc.*, __ F. Supp. 2d. __, __, No. 01-1380, 2001 WL 1148131 (D.P.R. Aug. 27, 2001); *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 62 F. Supp. 2d 1116, 1130-31 (S.D.N.Y. 1999); *City & County of San Francisco v. Hartford Life Ins. Co.*, No. C 99-0225 CRB ARB, 1999 WL 354522, at *5 (N.D. Cal. May 17, 1999); *Kanter v. Warner-Lambert Co.*, 52 F. Supp. 2d 1126, 1131-32 (N.D. Cal. 1999); *Casteel v. Sara Lee Corp.*, 51 F. Supp. 2d 816, 822 (E.D. Mich. 1999); *Universal Jewelry & Watch Repair, Inc. v. United Parcel Serv., Inc.*, No. 99-70016, 1999

U.S. Dist. LEXIS 5957, at *6-7 & n.2 (E.D. Mich. April 12, 1999); *Daniels v. Philip Morris Cos.*, 18 F. Supp. 2d 1110, 1114 (S.D. Cal. 1998); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659, 666 (S.D. Fla. 1997); *Crosby v. Am. Online, Inc.*, 967 F. Supp. 257, 263 (N.D. Ohio 1997); *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 819-20 (E.D. Pa. 1997); *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347-48 (S.D.N.Y. 1996); *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 224 (S.D.N.Y. 1996); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1415-16 (N.D. Fla. 1996); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1010 (W.D. Ark. 1996); *Blair v. Source One Mortgage Servs. Corp.*, 925 F. Supp. 617, 622-24 (D. Minn. 1996); *Snider v. Stimson Lumber Co.*, 914 F. Supp. 388, 389-92 (E.D. Cal. 1996); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 716-17 (C.D. Cal. 1995); *Waters v. Grosfeld*, 904 F. Supp. 616, 620 (E.D. Mich. 1995); *Shelly v. S. Bell Tel. & Tel. Co.*, 873 F. Supp. 613, 616 (M.D. Ala. 1995); *In re Potash Antitrust Litig.*, 866 F. Supp. 406, 413 (D. Minn. 1994); *Benfield v. Mocatta Metals Corp.*, No. 91 Civ. 8255, 1993 WL 148978, at *4 (S.D.N.Y. May 5, 1993); *Hairston v. Home Loan & Inv. Bank*, 814 F. Supp. 180, 181 n.1 (D. Mass. 1993); *Mayo v. Key Fin. Serv., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993); *Averdick v. Republic Fin. Serv., Inc.*, 803 F. Supp. 37, 45-46 (E.D. Ky. 1992), *overruled on other grounds*, *Page v. City of Southfield*, 45 F.3d 128, 132-33 (6th Cir. 1995).

This lasting uncertainty regarding the impact of a single statute, indeed of a subsection of a single statute, has prompted a regrettable expenditure of judicial and private resources. Litigation devoted solely to which court system has authority over a matter, as this Court has recognized, is far from desirable or efficient; in point of fact, "litigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). *See Jerome B. Grubart, Inc. v. Great Lakes Dredge &*

Dock Co., 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment) (noting that a "clear bright-line" jurisdictional rule "ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction"). Plaintiffs and defendants alike, to say nothing of district court judges, will benefit from a definitive resolution of the issue and what comes with it — a clear allocation of judicial responsibility between state and federal courts over class-action cases.

For another reason, opportunities to review these issues arise infrequently in the federal system. Because "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," 28 U.S.C. § 1447(d), most trial-level decisions addressing the issue may not be reviewed in this Court, or in the courts of appeals, at all. Such cases accordingly may be reviewed only in situations like this one, where an award of attorney fees (arising out of the removal motion) depends upon the propriety of the remand. Pet. App.37a-38a (noting that "if the district court's exercise of discretion was grounded in a determination of law that we reject," reversal is required (internal quotation marks omitted)).

All of this is prelude, however, to the final reason for granting review of the first question presented: The Court has already done so before. No doubt, in light of these considerations, the Court previously granted review of the issue in *Abbott Labs.* 529 U.S. at 333. And since the affirmance of that decision by an evenly-divided Court, the urgency of addressing this question has only increased.

C. The Ninth Circuit Misconstrued Section 1367.

Besides addressing a question that has sharply divided the lower courts and besides addressing a matter that affects the day-to-day functioning of all state and federal courts, the court of appeals erred in its ultimate resolution of the issue. While

the Ninth Circuit properly held that section 1367 abrogates *Zahn*, it failed to recognize an indispensable corollary to that conclusion — namely, that supplemental jurisdiction may be triggered by the claims of named or unnamed class members that meet the amount-in-controversy requirement. The mistake warrants review.

1. By Its Terms, Section 1367 Allows Courts To Exercise Supplemental Jurisdiction Over Class Members Whose Claims Do Not Meet The Amount-In-Controversy Requirement.

The court below properly held (Pet. App. 9a-16a) that the plain language of section 1367 authorizes supplemental jurisdiction over the claims of some class members where the claims of others lie within the federal courts' original jurisdiction. Such claims fall squarely within the grant of supplemental jurisdiction established by this 1990 amendment.

Section 1367(a) imposes two conditions on the exercise of federal supplemental jurisdiction over claims in "any civil action": (1) a federal court must have "original jurisdiction" over at least one claim; and (2) the claims over which supplemental jurisdiction is sought must be part of the same "case or controversy" as the original claim. 28 U.S.C. § 1367(a). As to the first element, undisputed evidence confirms that more than sixty class members have claims satisfying the $75,000 threshold. And as to the second, no one disputes that all of the class claims stem from the same "case or controversy."

Section 1367(b) excepts only two categories of claims from this rule. The first category involves claims against those who are parties by virtue of Rules 14 (third-party practice), 19 (compulsory joinder), 20 (permissive joinder), and 24 (intervention) of the Federal Rules of Civil Procedure. The second involves claims by those proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs

under Rule 24. Conspicuously missing from this carve-out provision, however, is any reference to Rule 23 class-action claims. The affirmative creation of supplemental jurisdiction over these claims in subsection (a) thus is not limited by subsection (b). Only one tenable conclusion can be drawn from the straightforward text of subsections (a) and (b): Section 1367 abrogates *Zahn*, plain and simple.

Nor does the legislative history lead to a contrary conclusion. One sentence of that history, it is true, says that "[t]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 101-734, at 29 (Sept. 10, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875. And a footnote accompanying the sentence includes citations to two cases, including *Zahn*. *Id.* n.17. But whatever the proper role of legislative history, the Court has "never given authoritative weight to a single passage of legislative history that is in no way anchored to the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994). "To give effect to this snippet of legislative history, [the Court] would have to abandon altogether the text of the statute as a guide in the interpretation process." *Id.*

No less significantly, the sentence is irrelevant on its own terms. It merely clarifies that § 1367 does not affect the "requirements of 28 U.S.C. § 1332," the diversity statute. That view of course remains consistent with the plain meaning of section 1367, which does *not* affect the requirements for original diversity jurisdiction under § 1332, but merely addresses claims over which federal courts may exercise supplemental jurisdiction.

2. Section 1367 Does Not Distinguish Between Named And Unnamed Class Members.

Having correctly resisted the siren call of this legislative history, the Ninth Circuit nonetheless failed to recognize that its adherence to the text of section 1367 applies with equal force to supplemental jurisdiction triggered by the claims of unnamed *as well as* named claimants. The lower court's contrary view turned relied on the statutory phrase "original jurisdiction": The words "'original jurisdiction,'" the court concluded, do "not refer to jurisdiction over claims not made — or not yet made — in the complaint," and thus "a class action, when filed, includes only the claims of the named plaintiff or plaintiffs." Pet. App. 20a.

But this construction is flatly incorrect. If the claims of unnamed class members were not "include[d]" at the time of filing, they of course could not have defeated jurisdiction over class actions *before* the passage of section 1367. Indeed, *Zahn* itself would have come out differently under this interpretation, as each named class representative in *Zahn* satisfied the jurisdictional minimum. *See* 414 U.S. at 291-92. In other words, if unnamed class members did not factor into the jurisdictional-minimum calculus, *Zahn* would have upheld jurisdiction over the class in that case. The Ninth Circuit's sole textual argument in support of its named/unnamed distinction thus rests upon a straightforward and demonstrable error.

The Ninth Circuit also reasoned that its distinction between named and unnamed class members "mirrors the treatment of the complete diversity requirement." Pet. App. 20a. That is not true and is irrelevant to boot. It is not true because complete diversity requires *all* named plaintiffs to be diverse, while section 1367 (as the Ninth Circuit agreed) requires only that *any single* named plaintiff satisfy the amount-in-controversy requirement. And it is irrelevant

because the two requirements serve distinct goals, which is why this Court has never implemented them in parallel ways.

Nor was the Ninth Circuit correct in saying that this distinction was a "[]practical" necessity because unnamed class members "are free to opt out of the class, and because a denial of class certification would prevent the court from taking jurisdiction over the claims of the unnamed class members." Pet. App. 20a-21a (internal quotation marks omitted). The propriety of removal, however, is generally determined at the time of removal; it is not affected by later events. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 390 (1998) ("[F]or purposes of removal jurisdiction, we are to look at the case as of the time it was filed in state court."). Just as the post-removal addition of a non-diverse defendant does not necessarily defeat removal, so the post-removal opt out of an unnamed class member does not do so either. The Ninth Circuit's vast overstatement is underscored by case law from other contexts, such as Rule 23(e). Under that provision, in considering an effort to settle a case, "an action filed as a class action should be treated as if certification has been granted for the purpose of settlement until certification is denied." *Phillips v. Allegheny County, Pennsylvania*, 869 F.2d 234, 237 (3d Cir. 1989); *accord* C. Wright, *et al.*, 7B *Federal Practice and Procedure* § 1797, at 347-50 (2d ed. 1986). The Ninth Circuit's unqualified assumption about the treatment of absent class members' claims before certification is simply not true.

Perhaps most importantly, a court focused on the "practical" implications of this issue ought to have considered something else. It makes little sense to interpret section 1367 as abrogating *Zahn* (as the Ninth Circuit did), then to nullify that interpretation by concluding that only the claims of *named* class members count for ascertaining whether the jurisdictional threshold has been satisfied (as the Ninth Circuit also did). It is exceedingly doubtful that a Congress wishing

to abrogate *Zahn* would simultaneously permit claimants freely to avoid this change in the law by including in the class-action complaint only named parties with claims under the jurisdictional amount. No legislature committed to correcting the former would allow the latter.

II. THE COURT SHOULD DECIDE HOW PUNITIVE DAMAGES ARE TREATED IN ASCERTAINING THE AMOUNT IN CONTROVERSY.

The Ninth Circuit also announced a blanket rule that "punitive damages cannot be aggregated and attributed in total to each member of a class action for purposes of the amount-in-controversy requirement." Pet. App. 32a. This holding was in error, and raises an important issue that has also generated numerous appellate and trial-level decisions.

A. The Treatment Of Punitive Damages In Class Actions Is An Important And Recurring Issue That Has Generated Confusion In The Federal Courts.

The appropriate treatment of punitive damages in this area arises in any diverse state-court class action involving punitive-damage claims that may exceed $75,000. As a result, the issue has spawned countless lower-court decisions and, like the *Zahn*/1367 question, has sparked a remarkable volume of duplicative litigation. Because most circuits have weighed in on the question and because the issue overlaps with many of the *Zahn*/1367 questions, this issue also warrants review.

Typical of the confusion generated by this debate is the experience of the Fifth Circuit. That court initially upheld the aggregation of punitive damages in a case involving Mississippi law. In *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1333-34 (5th Cir. 1995), a decision authored by Judge Smith, the court held that punitive damages differ in fundamental ways from compensatory awards and accordingly

merit differential treatment in ascertaining the amount in controversy. Because "each plaintiff has an integrated right to the full amount of an award" in the punitive-damages setting, the court concluded that they could not be divided and attributed pro rata to each plaintiff or putative plaintiff in a class action. *Id.*

Yet, two years later, another panel of the circuit restricted *Allen* to the "peculiar" context of Mississippi punitive damages law. *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998). In doing so, however, the *Ard* court relied on a 1978 decision under Alabama law, *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978), which itself offered no analysis of the issue. *Ard*, 138 F.3d at 602. A third, more recent, panel of the Fifth Circuit has ruled, in conflict with both *Allen* and *Ard*, that *Allen* is inconsistent with *Lindsey*, and thus is no longer good law under *any* circumstances. *H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000), *cert. denied*, 2001 WL 914495 (Oct. 1, 2001). Adding still more confusion to the mix, *H&D Tire* itself applied *Texas* law, and thus its discussion of *Allen*'s force under Mississippi law would appear to be *dictum*. Neither is this uncertainty limited to the Fifth Circuit. The *Lindsey* decision, which predates the division of the Fifth Circuit, has generated similar confusion within the Eleventh Circuit as well. *Compare Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-73 (11th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000), *with Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358-59 (11th Cir. 1996).

In addition to the Ninth Circuit in this case, four other courts of appeals have addressed the issue. And like the Ninth Circuit, they have concluded that punitive damages should be divided pro rata among all putative class members in determining the amount in controversy. *See Crawford v. F. Hoffman-La Roche Ltd.*, No. 00-2951, 2001 WL 1160354, at *4 (8th Cir. Oct. 3, 2001); *Martin v. Franklin Capital Corp.*,

251 F.3d 1284, 1292-93 (10th Cir. 2001); *Gilman v. BHC Secs., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997); *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315-16 (7th Cir. 1996).

District courts outside of these circuits, it bears adding, have issued conflicting decisions on the point. Several district courts have permitted aggregation of punitive-damage claims. *See, e.g.*, *Durant v. Serv. Master Co.*, 147 F. Supp. 2d 744, 750 (E.D. Mich. 2001); *Knaver v. Ohio State Life Ins. Co.*, 102 F. Supp. 2d 443, 449 (N.D. Oh. 2000). And others have not. *See, e.g.*, *Medley v. Am. Int'l Ins. Co.*, No. 01-3735, 2001 WL 892793, at *1 (E.D. Pa. 2001); *Mattingly v. Hughes Elec. Corp.*, 107 F. Supp. 2d 694, 697 (D. Md. 2000); *Robinson v. Computer Learning Ctrs.*, No. 99-3904, 1999 WL 817745, at *2 (E.D. Pa. 1999); *Lauchheimer v. Gulf Oil*, 6 F. Supp. 2d 339, 346-47 (D.N.J. 1998).

All told, seven courts of appeal and numerous district courts now have considered the question. Thus, even if one treats the Fifth and Eleventh Circuits as aligning with the other five appellate courts and even if one disputes the observations of *ABS Ins., Ltd. v. Nat'l Union Fire Ins. Co.*, 51 F. Supp. 2d 762, 768 (E.D. Tex. 1999) (claiming that the issue has produced, and will continue to produce, "confusion among the circuits, within the circuits, and, consequently, across the board with all districts" until this Court resolves the question), most circuits have now addressed the issue. Nor can anyone doubt that the most-heavily populated circuits (the Second, Seventh, and Ninth) have already staked out a position on the point. That makes further percolation of the issue of doubtful utility. Additional lower-court deliberation over the issue, moreover, is particularly inappropriate given the interconnection of this issue to the *Zahn*/1367 question and given the nature of the error that the Ninth Circuit made in this case, which we now show.

B. The Ninth Circuit Misinterpreted *Snyder v. Harris*, 394 U.S. 332 (1969), In Addressing This Issue.

The Ninth Circuit made two basic mistakes in resolving this question. First, to the extent the court felt a need to divide this request for relief among the plaintiffs, it should have attributed the punitive-damage claims to the named plaintiffs in ascertaining the amount in controversy, in view of its theory (elsewhere in the same opinion) that only the claims of named plaintiffs count for determining the jurisdictional minimum. Second, and alternatively, it should have treated these punitive-damage claims as indivisible in nature.

In refusing to look at whether the claims of *unnamed* class members could determine the court's jurisdiction, the Ninth Circuit did so on the ground that "a class action, when filed, includes only the claims of the named plaintiff or plaintiffs." Pet. App. 20a. Several pages later in the same opinion, however, the court maintained that punitive damages must be allocated *per capita* among the very unnamed class members that it determined could not be treated as part of the case. Pet. App. 29a-32a. The Ninth Circuit's inconsistent treatment of these two issues cannot simultaneously be correct. To respect the one analysis necessarily slights the other. The Court should grant review to announce a uniform rule for determining when unnamed class members may factor into the jurisdictional equation.

No less significantly, the court of appeals failed to appreciate that punitive-damage claims under California law, and particularly in a case of this sort, are indivisible in nature and accordingly may be aggregated (*i.e.*, the entire request may be attributed to each class member). In *Snyder v. Harris*, 394 U.S. 332, 335 (1969), the Court held that the class members' interest in a potential recovery of damages is properly aggregated for jurisdictional purposes when it constitutes a

joint claim in which the plaintiffs "have a common and undivided interest."

This rule has special relevance to the punitive-damage claim filed here. As in most other States, *see, e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) ("punitive damages are imposed for purposes of retribution and deterrence" in most States in the country), punitive damages in California are awarded "to punish wrongdoing and thereby protect *the public* from future misconduct, either by the same defendant or by other potential wrongdoers." *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1155 (1998) (emphasis added); *accord Whelan v. Rallo*, 52 Cal. App. 4th 989, 992 (1997). Because punitive damages consider the defendant's conduct and because they were sought in this case based on alleged classwide misconduct that did not vary from plaintiff to plaintiff, they are indivisible under *Snyder*.

These differences between punitive damages and compensatory damages are underscored by the fact that such damages often are paid, at least in part, to the State itself. *See, e.g.*, Iowa Code Ann. § 668A.1(2)(b) (allocating at least 75% of punitive awards to the State); Mo. Ann. Stat. § 537.675(2) (allocating 50% of punitive awards to the State); Or. Rev. Stat. § 18.540(1)(a) (allocating 60% of punitive awards to the State); Utah Code Ann. § 78-18-1(3) (allocating 50% of punitive award above $20,000 to the State).

The Ninth Circuit, notably, did not dispute these differences between punitive damages and other forms of relief. To the contrary, it embraced the distinction. *See* Pet. App. 30a ("Because punitive damages do not compensate for harm, plaintiffs cannot calculate with precision the amount of the punitive damage award attributable to each class member."). Rather, the Ninth Circuit reasoned that *if* there had been no class action, then "nothing would [have] preclude[d class members] from seeking and recovering punitive damages individually." Pet App. 30a. The court

believed that this inference precluded the aggregation of punitive damages here.

The Ninth Circuit's observation is, in truth, irrelevant. That punitive damages may be brought in an individual action does not alter the fact that in a class setting, such damages may be indivisible under some states' laws and on some records. But in this case, the court of appeals did not even make an effort to look at why a classwide action was sought here and why the nuances of California punitive-damages law required aggregation. As one commentator has observed, this argument commits the "logical fallacy" of "ignor[ing] the fact that the plaintiffs have chosen to pursue their claims as a class." Christopher J. Willis, *Aggregation of Punitive Damages in Diversity Class Actions: Will The Real Amount In Controversy Please Stand Up?*, 30 Loy. L.A. L. Rev. 775, 784 (1997); *see also id.* at 785 ("The fact that the class members' demands could be separate and distinct if they pursued their claims individually does not mean that the punitive damages sought by the class when they choose to proceed together are also separate."). Moreover, the appellate court failed to appreciate that punitive damages in individual actions cannot be segregated from other such awards in other individual cases in any event. *See, e.g.*, *Adams v. Murakami*, 54 Cal. 3d 105, 117 (1991); *Delos v. Farmers Group, Inc.*, 93 Cal. App. 3d 642, 667 (Cal. Ct. App. 1979). The Ninth Circuit conceded this fact, *see* Pet. App. 31a (citing *Delos*), but merely dismissed it as contrary to the policy underlying *Snyder*. In fact, however, *Snyder* expressly held that its general policy against aggregation has no application where plaintiffs seek to effectuate an indivisible remedy common to the class, such as the punitive damages here at issue. 394 U.S. at 335.

All things considered, the issue warrants review. Countless district courts have struggled with the issue, seven courts of appeals have now addressed the point, and the Ninth Circuit's resolution of the issue is not only mistaken but

irreconcilably at odds with other parts of the same opinion in this case.

III. THE RESOLUTION OF THESE QUESTIONS WILL ALLOW DISTRICT COURTS TO RESOLVE MOST (IF NOT ALL) AMOUNT-IN-CONTROVERSY DISPUTES THROUGH JURISDICTIONAL DISCOVERY.

One might fairly ask how litigation of this sort proceeds beyond the initial stages of a case. To the uninitiated, it would seem that every amount-in-controversy dispute could be readily resolved by requiring plaintiffs to supply binding "yes" or "no" answers to one simple question: Do any class members seek more than $75,000 in damages and attorney fees?

But as the facts in this case reveal, the rub is in knowing how to frame the question. Should the question relate solely to named parties or should it include other known members of the class as well? Should it require all class parties to have an amount in controversy over $75,000, as *Zahn* once established, or should it require just one class member to do so, as section 1367 seems to permit? And should it treat punitive damages as an indivisible whole or as an award to be divided among named class members, or even all class members as the case may be? Since the 1990 passage of section 1367, these questions have haunted district courts as well as responsible class-action litigants eager to put to rest the threshold question of where, not how, a dispute should be resolved.

Indeed, in this very case, DaimlerChrysler diligently and repeatedly sought admissions designed only to establish this overriding, yet persistently elusive, fact. But, with no settled frame of reference regarding the proper question to answer, neither the plaintiffs nor the district court was willing to resolve the issue. Clarification of these matters will

establish an efficient, straightforward and equitable framework for answering these amount-in-controversy questions and in the process will eliminate many of the *Bleak House* qualities that cloud modern-day class-action litigation. Once the Court answers the *Zahn*/1367 and punitive-damages issues, it will be the rare amount-in-controversy dispute that cannot forever be resolved by binding answers to one interrogatory.

Nor is there any reason to doubt that the lower federal courts will authorize this dispositive and limited jurisdictional discovery once agreement over these issues materializes. Every instinct of efficiency, common sense and fairness, to say nothing of self-preservation, favors it. In the past, when plaintiffs have filed a diversity claim in federal court and defendants have contested the amount in controversy, all have agreed that plaintiffs are entitled to jurisdictional discovery to establish federal jurisdiction over the claim. *See, e.g., Neiderhiser v. Berwick*, 840 F.2d 213, 216 n.6 (3d Cir. 1988) (holding that party seeking to invoke jurisdiction must be "allowed . . . sufficient time to present evidence or otherwise respond on the issue of jurisdiction"); *Majd-Pour v. Georgiana Comm. Hosp., Inc.*, 724 F.2d 901, 902-03 (11th Cir. 1984) ("We hold that the district court's dismissal without affording the plaintiff any opportunity to proceed with reasonable discovery was premature and an abuse of the court's discretion"); *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984) (holding that a district court "must . . . afford the nonmoving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction"). And when a defendant tries to exercise the mirror-image right of invoking the federal courts' jurisdiction by removal, the courts likewise have generally held that defendants may obtain post-removal discovery in responding to a remand motion. *See, e.g., Harmon v. OKI Sys.*, 115 F.3d 477 (7th Cir. 1997); *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996) (noting that "before passing on the . . . motion to remand, the court may have had to authorize further

discovery"); *Allen v. R&H Oil & Gas Co.*, 63 F.3d at 1335-36 (noting that the district court should "require parties to submit summary-judgment-type evidence, relevant to the amount in controversy at the time of removal").

In the last analysis, each of the customary explanations for review favors granting the petition. But in this case, one additional factor compels this conclusion as well: The resolution of both questions presented will give district courts the long-sought-after guidance and tools they need to eliminate these costly jurisdictional disputes at the outset. Review is warranted, and needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

STEVEN B. HANTLER
ALLAN M. HUSS
MARY E. WALDRUP
DAIMLERCHRYSLER CORP.
1000 Chrysler Drive
Auburn Hills, MI 48326

JEFFREY S. SUTTON
(*Counsel of Record*)
MICHAEL S. FRIED
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215

Counsel for Petitioner

November 2001

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

URSULA GIBSON; MARY DEPINA, individually on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,
v.

CHRYSLER CORPORATION, Defendant-Appellant.
Paul Maldonado, Plaintiff-Appellee,
v.

Chrysler Corporation, Defendant-Appellant.
Stephen Depalma, Plaintiff-Appellee,
v.

Chrysler Corporation, Defendant-Appellant.
Ursula Gibson; Mary Depina, individually on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,
v.

Chrysler Corporation, Defendant-Appellant.
Stephen Depalma, Plaintiff-Appellee,
v.

Chrysler Corporation, Defendant-Appellant.
Paul Maldonado, Plaintiff-Appellee,
v.

Chrysler Corporation, Defendant-Appellant.

Nos. 99-16436, 99-17021, 99-16441, 99-17066, 99-16493, 99-17067.

Argued and Submitted Dec. 14, 2000

Filed Aug. 20, 2001

Before: SCHROEDER, HALL, and W. FLETCHER, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

Chrysler Corporation ("Chrysler")[1] appeals sanctions and attorneys' fees awarded by the district court. Chrysler has twice attempted to remove plaintiffs' class actions from California state court to federal court. After Chrysler's second attempt, the district court held that several of Chrysler's arguments were frivolous, and awarded sanctions and fees. We believe that removal was improper, but we hold that Chrysler's arguments, taken as a whole, were not frivolous. We reverse the district court's award of sanctions, but we affirm the district court's award of attorneys' fees.

I. BACKGROUND

This appeal involves three state-law class actions against Chrysler. The complaints in all three actions alleged that Chrysler used a finishing process known as "electrocoat" (marketed under various trade names, including "Uniprime," "HBEC," and "Ecoat") to paint vehicles it manufactured between 1986 and 1997. Plaintiffs alleged that the electrocoat process produced a poor bond between the primer and the exterior paint on the vehicles, and that the exterior paint is prone to peel off, especially after prolonged exposure to ultraviolet light. They further alleged that Chrysler knew about the problem, but neither disclosed the defect to its customers nor properly honored warranty claims. All three of the complaints alleged causes of action for breach of express warranty, violation of California's Song Beverly Warranty Act, and unfair competition and business practices. Two of the complaints also alleged a cause of action for breach of contract. All three complaints alleged facts sufficient to

---

[1]We refer to the defendant corporation as "Chrysler," even though it became DaimlerChrysler during the course of this litigation.

establish complete diversity of citizenship,[2] but none alleged that the amount in controversy exceeded $75,000.

In early 1998, Chrysler removed all of the actions to federal court based on diversity. Plaintiffs moved to remand the actions to state court. Chrysler opposed remand and moved for an order granting limited discovery of facts relevant to the amount in controversy. The district court denied Chrysler's discovery motion and remanded. In remanding, the district court stated that if Chrysler could establish facts through state court discovery showing an amount in controversy in excess of $75,000, it could properly return to federal court. The district court warned, however, that sanctions might be appropriate if Chrysler again attempted to remove improperly because Chrysler's legal arguments had been repeatedly rejected by other district courts.

Chrysler sought a writ of mandamus from this court that would have required the district court to reconsider its remand order and its denial of limited discovery. We denied the writ in an unpublished order. After remand, plaintiffs consolidated their actions and filed a single first amended complaint. This complaint alleged that "[t]he amount in controversy as to the plaintiffs and each class member does not exceed $75,000, including interest and any pro rata award of attorneys' fees and costs, and damages," and that the amount in controversy averaged less than $30,000 per plaintiff. It repeated the causes of action alleged in the first complaint, and added a claim under

---

[2]The named plaintiffs are citizens of California, and defendant Chrysler was a Delaware corporation with its principal place of business in Michigan. The complete diversity requirement in class actions is based on the citizenship of the named plaintiffs at the time the action is filed. *See Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986). The citizenship of unnamed class members is disregarded. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921).

California's Consumer Legal Remedies Act, which provides for punitive damages. *See* Cal. Civ. Code § 1780(a).

Chrysler requested discovery in state court relevant to the amount in controversy required for diversity jurisdiction in federal court. It also asked plaintiffs either to waive their requests for punitive damages and attorneys' fees or to stipulate that they did not seek any recovery in excess of $75,000 for any plaintiff. Plaintiffs did not comply with these requests, and the state court did not compel them to do so. Believing that it faced a one-year deadline for removal of the case under 28 U.S.C. § 1446(b), Chrysler filed a second notice of removal on March 5, 1999, one day before the deadline would take effect.[3] Chrysler again asserted that the plaintiffs' (now-consolidated) action satisfied the amount-in-controversy requirement.

Plaintiffs moved for remand, for sanctions under Rule 11, and for attorneys' fees under 28 U.S.C. § 1447(c). The district court granted all three motions. It held not only that Chrysler had failed once again to establish diversity jurisdiction, but also that several of its arguments were "clearly frivolous in light of this court's July 20 Order and the decisions of other courts in the Ninth Circuit." The district court imposed Rule 11 sanctions of $1,500 and ordered Chrysler to pay attorneys' fees for the time spent by plaintiffs in opposing Chrysler's second attempted removal (an amount later determined to be $28,650). Chrysler timely appealed.

---

[3]We have held that the one-year deadline of 28 U.S.C. § 1446(b) for removing diversity cases applies only to cases in which there is no basis for diversity jurisdiction when the case is filed in state court. If there is a basis for diversity jurisdiction at the time of filing, there is no deadline. *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998); *accord Brierly v. Alusuisse Flexible Packaging, Inc.*, 170 F.3d 583, 589-90 (6th Cir. 1999); *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 885-86 (5th Cir. 1998).

II. APPELLATE JURISDICTION

We first consider our appellate jurisdiction. The removal statute directs district courts to remand any case removed from a state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). It goes on to provide, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *Id.* § 1447(d); *see also Things Remembered, Inc., v. Petrarca*, 516 U.S. 124, 128 (1995). Section 1447(d) prevents Chrysler from directly challenging the district court's remand order on appeal. But Chrysler can challenge the district court's decision to impose sanctions and to award attorneys' fees.[4] *See* 28 U.S.C. § 1291.

We have held that a party sanctioned for a frivolous removal cannot appeal the sanction on the ground that removal was proper; reversal on that ground alone would constitute direct review of the remand order, which is precluded by § 1447(d). *See Lemos v. Fencl*, 828 F.2d 616, 617-18 (9th Cir. 1987). But, as we held in *Lemos*, a party can appeal an award of sanctions or fees on the ground that the removal was neither frivolous nor filed for an improper purpose. A ruling on the propriety of an award of sanctions or fees is not the same thing as a direct ruling on the propriety of a remand. *Id.* at 619; *see also Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772, 775 (9th Cir. 1990). We have said that in evaluating the propriety of an award of attorneys' fees, we must give "some consideration" to the merits of a remand order, and that this kind of evaluation does not violate the command of

---

[4]Although the district court lacked subject matter jurisdiction over the case, it did have jurisdiction to impose sanctions and a fee award. *See Moore v. Permanente Med. Group*, 981 F.2d at 445; *Westlake North Prop. Owners Assoc. v. City of Thousand Oaks*, 915 F.2d 1301, 1303 (9th Cir. 1990).

§ 1447(d). *See Moore v. Permanente Med. Group*, 981 F.2d 443, 447 (9th Cir. 1992). More recently, we have held that review of a fee award under § 1447(c) "must include a de novo examination of whether the remand order was legally correct." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1106 (9th Cir. 2000). Accordingly, in reviewing the district court's award of sanctions and attorneys' fees, we must address the merits of Chrysler's arguments in favor of removal.

III. DIVERSITY JURISDICTION IN THE DISTRICT COURT

The sole dispute in the district court was whether plaintiffs' consolidated class action satisfied the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332. A defendant attempting to remove a diversity case must show by a preponderance of the evidence that the amount-in-controversy requirement is satisfied. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996).

Chrysler makes two arguments to support its conclusion that the amount-in-controversy requirement was satisfied in the district court. Chrysler's first argument relies on supplemental jurisdiction. Chrysler argues that the district court had original jurisdiction over the claims of individual plaintiffs who satisfied the amount-in-controversy requirement, and supplemental jurisdiction over the claims of the remaining class members who did not. Chrysler's second argument is that the plaintiffs seek monetary compensation that is the "common and undivided interest" of the class members, and that the proper amount to consider for purposes of jurisdictional requirements is not each plaintiff's pro rata share, but rather the aggregated sum of those shares.

For the reasons that follow, we disagree with both arguments. We agree with some aspects of Chrysler's

supplemental jurisdiction argument, but we disagree with others; considered as a whole, the argument fails. We disagree with the entirety of Chrysler's aggregation argument. We consider the arguments in turn.

A. Supplemental Jurisdiction

1. Supplemental Jurisdiction Based on Claims of Individual Named Plaintiffs

Chrysler argued twice before the district court that there was federal subject matter jurisdiction over the entire class action, including the claims of the unnamed class members, because the individual named plaintiffs each had claims worth more than $75,000. Chrysler argued that 28 U.S.C. § 1367 confers supplemental jurisdiction over the claims of unnamed class members when there is subject matter jurisdiction over the claims of the named plaintiffs. Although the Supreme Court held in *Zahn v. International Paper Co.*, 414 U.S. 291, 300 (1973), that each member of a class must satisfy the amount-in-controversy requirement, Chrysler argued that § 1367, enacted after *Zahn*, overrules that case. The district court disagreed. It recognized that other circuits had adopted Chrysler's reasoning, but aligned itself with what it described as the "chorus of courts" that had reaffirmed *Zahn* after the passage of § 1367.

Of the circuit courts that have reached the issue, the Fifth and the Seventh have agreed with Chrysler. *See In re Abbott Lab.*, 51 F.3d 524, 529 (5th Cir. 1995), *Stromberg Metal Works, Inc., v. Press Mech., Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996) (agreeing with *Abbott Labs.*, in a Rule 20 joinder case); *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) (following *Stromberg Metal Works* in a Rule 23 class action). The Third, Eighth, and the Tenth have agreed with the district court. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000);

Leonhardt v. Western Sugar Co., 160 F.3d 631, 640-41 (10th Cir. 1998). The Supreme Court granted certiorari in *Abbott Laboratories*, but after the recusal of one Justice it affirmed without opinion by an equally divided Court. *See* 529 U.S. 333 (2000). For the reasons that follow, we agree with the Fifth and Seventh Circuits in *Abbott Laboratories* and *Stromberg Metal Works*, and hold that *Zahn* is overruled by § 1367.

a. The Plain Meaning of § 1367

Section 1367 was enacted as part of the Judicial Improvement Act of 1990, seventeen years after the Supreme Court's decision in *Zahn*. In relevant part, it provides:

> (a) Except as provided in subsection[ ](b) . . ., in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

The first two courts of appeals to consider the effect of § 1367 on *Zahn*-the Fifth and Seventh Circuits-had no doubt about the plain meaning of this text. The Fifth Circuit in

Abbott Laboratories stated its conclusion succinctly: "[T]he statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions . . . [U]nder § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives." *Id.* at 528-29. The Seventh Circuit agreed, writing that the result in *Abbott Laboratories* "has strong support from the statutory text." *Stromberg Metal Works*, 77 F.3d at 930. Our own analysis convinces us that *Abbott Laboratories* properly understood the plain meaning of the text of § 1367, and correctly held that the claims of unnamed class members in a diversity class action need not satisfy the amount-in-controversy requirement.

The Tenth and Eighth Circuits have argued that the text of § 1367 has a plain meaning, but they reached the opposite conclusion about what that plain meaning is. In *Leonhardt*, the lead case, the Tenth Circuit made two textual arguments to support its conclusion. Because of the importance of the plain meaning of § 1367, we analyze those two arguments in detail.

(1) The Meaning of "Original Jurisdiction" in § 1367(a)

Leonhardt's first argument is that § 1367(a) does not confer supplemental jurisdiction over unnamed class members whose claims do not satisfy the amount-in-controversy requirement because the term "original jurisdiction" in subsection (a) has a different meaning in diversity cases than in federal question cases.[5] *Leonhardt* notes that under subsection

---

[5]This argument was originally suggested by Professor James Pfander in a then-unpublished law review article. *See* 160 F.3d at 639 n.6; James E. Pfander, "Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism," 148 *U. Pa. L.Rev.* 109 (1999).

(a) there is only supplemental jurisdiction over claims that are related to claims in a "civil action of which the district courts have *original jurisdiction*" (emphasis added). *Leonhardt* then argues that the existence of original jurisdiction under subsection (a) in a diversity case is determined by applying the basic diversity statute, 28 U.S.C. § 1332, to all the claims in the complaint. If § 1332 confers jurisdiction over all those claims, there is "original jurisdiction" within the meaning of subsection (a). However, if § 1332 confers jurisdiction over only some (but not all) of those claims, there is no "original jurisdiction." If there is no "original jurisdiction," there can be no supplemental jurisdiction either, for there is no jurisdiction to which supplemental jurisdiction can attach.

In the words of *Leonhardt*,

> In our view, a literal and textually faithful reading of § 1367(a) leads to the opposite conclusion from that of the Fifth and Seventh Circuits. Section 1367(a) specifically addresses "any civil action of which the district courts have *original jurisdiction.*" (Emphasis added). It then provides for *supplemental jurisdiction* over transactionally related claims. Section 1332 is what confers original jurisdiction over diversity cases and it expressly requires that the "matter in controversy exceed[] the sum or value of $75,000." While § 1332 does not expressly refer to class actions, the Supreme Court has noted that periodic congressional amendment of the diversity statute to alter only the *amount* in controversy evidences congressional agreement with the Court's holding that "matter in controversy" does "not encompass[] the aggregation of separate and distinct claims." *Snyder* [*v. Harris*], 394 U.S. at 339[.] Thus, Congress in § 1367(a) expressly excepted claims brought under § 1332 and its well- understood definition of "matter in controversy." *See* Pfander . . . ("Section 1367(a) appears to assume that the existing rules of original jurisdiction will continue to apply and that the grant of supplemental

> jurisdiction will come into play only after the plaintiff has submitted claims in a well-pleaded complaint that properly invoke such original jurisdiction.").
>
> 160 F.3d at 640. *See also Trimble*, 232 F.3d at 962 ("We agree with and adopt the reasoning of the Tenth Circuit in *Leonhardt*.").

For *Leonhardt* to be right, the term "original jurisdiction" in subsection (a) must mean something different in diversity and federal question cases. Everyone agrees that in a federal question case there need not be subject matter jurisdiction over all the claims in the complaint for there to be "original jurisdiction" within the meaning of subsection (a). Rather, there is "original jurisdiction" if there is subject matter jurisdiction over one claim in the complaint. If there is subject matter jurisdiction over that one claim, there is supplemental jurisdiction over all the other claims that are transactionally related.

An example will clarify the point. If a non-diverse plaintiff files a complaint with two transactionally related claims against a single defendant, one based on federal law and one based on state law, there is "original jurisdiction" under subsection (a) because there is subject matter jurisdiction over the federal-law claim. Because there is original jurisdiction, there is supplemental jurisdiction over the state-law claim. The example just described is, of course, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the paradigm case of pendent (now supplemental) jurisdiction. If *Leonhardt*'s definition of "original jurisdiction" were applied to federal question cases, § 1367 would overrule *Gibbs*. Since no one, including the *Leonhardt* panel, argues that § 1367 has that consequence, the question is whether "original jurisdiction" in subsection (a) has a different meaning in diversity cases from its unquestioned meaning in federal question cases. For several reasons, we believe that "original jurisdiction" means the same thing in both kinds of cases.

First, there is nothing in the text of subsection (a) to suggest, even remotely, that there is such a difference in meaning. Specifically, nothing in the text suggests that in a diversity case (but not in a federal question case) the term "original jurisdiction" in subsection (a) requires subject matter jurisdiction over all the claims in a complaint.

Second, even though subsection (b) applies only to diversity cases, "original jurisdiction" in that section is used in the sense concededly applicable to federal question cases in subsection (a). The meaning of "original jurisdiction" in subsection (b) is apparent from the fact that subsection (b) excludes from supplemental jurisdiction claims made by a plaintiff against a non-diverse defendant joined under Rule 20. A plaintiff will ordinarily join all Rule 20 defendants in the complaint rather than waiting to join them by a later or amended pleading. The exclusion of joined claims against non-diverse defendants from the supplemental jurisdiction granted by subsection (a) indicates that such claims are covered by supplemental jurisdiction, for there would otherwise be no reason for subsection (b) to except them from supplemental jurisdiction.

In order for such joined claims to have been covered by supplemental jurisdiction, "original jurisdiction" under subsection (a) must be determined by looking to see if there was subject matter jurisdiction over any one claim in the complaint, rather than over all of the claims in the complaint. If "original jurisdiction" under subsection (a) were determined by looking at all the claims in the complaint, there would have been no jurisdiction under § 1332 (and hence no "original jurisdiction") in the first place because there was a lack of complete diversity when all the claims were considered together. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The exclusion by subsection (b) of claims by non-diverse parties joined under Rule 20 from supplemental jurisdiction would thus be superfluous.

Third, we are reinforced in our reading of the term "original jurisdiction" by a precursor to § 1367. A proposed supplemental jurisdiction statute in a Working Paper of the Federal Court Study Committee provided as follows:

> (a) Except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same transaction or occurrence, including claims that require the joinder of additional parties.
>
> (b) In civil actions under § 1332 of this Title, jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, *provided*, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.

1 Federal Courts Study Committee, Working Papers and Subcommittee Reports, July 1, 1990 at 567-68 (hereinafter "Working Paper"). The proposed statute has the same basic analytic structure as the actual statute. Subsection (a) broadly confers supplemental jurisdiction, and subsection (b) takes away some of that jurisdiction in diversity cases. The proposed statute uses the single term "jurisdiction" to include both "original jurisdiction" and "supplemental jurisdiction," but we believe that this does not affect our analysis. The authors of the Working Paper explicitly stated what the effect of their proposed statute would be: "[O]ur proposal would overrule the Supreme Court's decision in *Zahn v. International Paper Co.* . . . From a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it." *Id.* at 561 n.33. We recognize that the Federal Courts Study Committee disagreed with this policy recommendation, but we do not rely on the Working Paper as evidence of what the Study Committee wanted to do. Rather, we cite it because the

text of the proposed statute is strikingly similar to the text of § 1367, and because the Study Committee explicitly stated that the text would overrule *Zahn*.

Finally, even if *Leonhardt*'s reading of "original jurisdiction" in subsection (a) were right, its ultimate holding would still be wrong. A class action complaint is filed only by a named plaintiff or plaintiffs. Although such an action is often referred to as a class action when it is filed, it is, at the time of filing, only a would-be class action. It does not become a class action until certified by the district court. The certification decision is not made at the time of filing, but, rather, "[a]s soon as practicable *after the commencement of an action*." Fed. R. Civ. P. 23(c) (emphasis added). And as Rule 3 tells us, "[a] civil action is commenced by filing a complaint with the court." Therefore, if there is complete diversity and a sufficient amount in controversy for the named plaintiff or plaintiffs in the complaint, there is "original jurisdiction" under subsection (a) over the class action, even as *Leonhardt* would read the term.

(2) The Meaning of the Last Phrase of § 1367(b)

Leonhardt's second argument is that the last phrase of subsection (b) indicates that § 1367 was not intended to overrule *Zahn*. For the convenience of the reader, we quote § 1367(b) again, and italicize the phrase in question:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, ***when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.***

Leonhardt does not analyze the precise meaning of the phrase on which it relies. The entirety of *Leonhardt*'s discussion consists of the following:

> That very language evidences a concern for preserving the historical and well-established rules of diversity. The fact that § 1367(b) prohibits the *addition* of claims and parties which would destroy diversity supports our interpretation of § 1367(a) as also fully respecting the rules of diversity in cases invoking the original jurisdiction of the federal courts.

160 F.3d at 640 (emphasis in original). We agree with *Leonhardt*'s general statement that the phrase "evidences a concern for preserving the historical and well-established rules of diversity," but we disagree with *Leonhardt* as to the specific meaning of the phrase.

The text of § 1367 has the following analytic structure: first, subsection (a) broadly confers supplemental jurisdiction, subject to certain exceptions; second, the first part of subsection (b) sets out exceptions to subsection (a); and third, the last phrase of subsection (b) limits the reach of those exceptions. We believe that the last phrase of subsection (b) means that there is supplemental jurisdiction over a claim otherwise excepted from supplemental jurisdiction by subsection (b) if § 1332, as understood before the passage of § 1367, would have authorized jurisdiction over that claim.

Such claims do exist. For example, subsection (b) excepts from supplemental jurisdiction a claim by a plaintiff against a third-party defendant who has been impleaded under Rule 14. To that extent, it codifies the result of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). But without its last phrase, subsection (b) would also except from supplemental jurisdiction a claim asserted by the plaintiff against the third-party defendant when that claim is a compulsory counterclaim to a claim by the third-party defendant against the plaintiff. The claim by the third-party

defendant against the plaintiff is clearly within the supplemental jurisdiction conferred by subsection (a), and it would be both unfair and inefficient to forbid the plaintiff's compulsory counterclaim to that claim. The question does not arise often, but there was circuit law before the passage of § 1367 holding that such a compulsory counterclaim was permitted under § 1332 pursuant to what was then known as ancillary jurisdiction. *See Revere Copper and Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 714-15 (5th Cir. 1970).

In contrast to the general reading in *Leonhardt*, our reading gives specific meaning to the last phrase of § 1367(b), for it preserves a small slice of supplemental jurisdiction that would otherwise have been lost. Moreover, our reading is entirely consistent with our conclusion that § 1367 overrules *Zahn*. As we read the phrase, it preserves ancillary (now supplemental) jurisdiction that existed under § 1332 prior to the passage of § 1367 and does nothing to prevent the expansion of such jurisdiction accomplished by the rest of § 1367.

b. The Legislative History of § 1367

For the reasons outlined above, we conclude that the text of § 1367 is clear, and that it confers supplemental jurisdiction over the claims of class members in a diversity class action when named plaintiffs have claims with an amount in controversy in excess of $75,000. After concluding that the text of the statute is unambiguous, we would normally not examine its legislative history. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also City of Chicago v. Envt'l Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law.").

However, this is an unusual case. Four courts have held that the text of § 1367 is clear, but they have split evenly on what that text means. The Fifth and Seventh Circuits, in *Abbott Laboratories* and *Stromberg Metal Works*, have held that the text clearly overrules *Zahn*. The Tenth and the Eighth Circuits, in *Leonhardt* and *Trimble*, have held that the text clearly preserves *Zahn*. A fifth court, the Third Circuit in *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, has held that the text is ambiguous, and has relied on legislative history to hold that it preserves *Zahn*.

All three courts holding that § 1367 preserves *Zahn* analyzed the legislative history of the statute. The Tenth and Eighth Circuits did so as a means of supporting their holdings, even though they found the text unambiguous. The Third Circuit did so as a means of ascertaining the meaning of the text, but noted that it would have done so even if it had found the text unambiguous:

> Although there is much to be said for *Leonhardt*'s view that the text does not displace *Zahn*'s ruling, we conclude that there is sufficient ambiguity in the statute to make resort to legislative history appropriate. . . . Even were we to conclude that Section 1367 is unambiguous, as *Abbott Laboratories* read[s] it, we would nevertheless turn to the legislative history because it is one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."

Meritcare, 166 F.3d at 222 (quoting *United States v. Sherman*, 150 F.3d 306, 313 (3d Cir. 1998)).

We agree with the Third, Eighth and Tenth Circuits to this degree: the legislative history provides a substantial basis to believe that the omission of claims by Rule 23 plaintiffs from subsection (b) of § 1367, and the resulting overruling of *Zahn*, was an oversight. For example, one of the Senate sponsors of

the Judicial Reform Act of 1990 repeatedly described as "noncontroversial" and "quite modest" those portions of the Act that amended § 1367. *See* 136 Cong. Rec. S 17577 (Oct. 27, 1990) (statement of Sen. Grassley). This is an unlikely characterization for a provision that would open the federal courts to a significant number of additional diversity class actions. Further, the House Judiciary Committee's report on the bill stated that § 1367 was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 101-734 at 28-29 (Sept. 10, 1990). That sentence ended with a footnote citing *Zahn*, strongly suggesting that the proposed statute was intended to preserve the outcome in that case. Finally, the three law professors who helped draft § 1367 published an article soon after its enactment declaring that *Zahn* "remain[ed] good decisional law." Thomas M. Mengler, Stephen B. Burbank, and Thomas D. Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 (Dec.-Jan.1991).

We do not believe that this is enough to overcome the plain meaning of the text. Legislative history can justify a judicial departure from a clear text if Congress makes an obvious clerical error, particularly if the error results in an absurd or difficult-to-justify result. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. . . . I think it entirely appropriate to consult all public materials, including the background of [the statute] and the legislative history of its adoption. . . ."). But that is not the case here. Even courts that have read § 1367 to preserve *Zahn* agree that overruling it would not be an absurd result. *See, e.g., Russ v. State Farm Mut. Auto. Ins. Co.* 961 F. Supp. 808, 819 (E.D.Pa. 1997) ("[O]verruling *Zahn* would not be absurd; arguably, it would be sensible."). Moreover, as shown in our

discussion of the Working Paper of the Federal Courts Study Committee, some of those involved in drafting § 1367 both knew that the language chosen for § 1367 would overrule *Zahn* and approved of that result on policy grounds.

The legislative history therefore does not persuade us that we should refuse to follow what we believe is the clear meaning of the text of § 1367. We understand that our holding may be thought to say to Congress, as Judge Pollak put it in *Russ*, "'We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: Gotcha! And better luck next time.'" 961 F. Supp. at 820. We sympathize with Judge Pollak's position, but we do not feel ourselves at liberty to hold that *Zahn* survives § 1367. If courts could ignore the plain meaning of statutory texts because their legislative histories showed that some (or even many) of those who drafted and voted for the texts did not understand what they were doing, the plain meaning of many statutes, not only § 1367, would be in jeopardy.

2. Jurisdiction Based on Claims of Unnamed Class Members

The preceding section explains our agreement with Chrysler's argument that there is supplemental jurisdiction over the claims of unnamed class members when the claim of an individual named plaintiff satisfies the amount-in- controversy requirement. We now address Chrysler's additional argument that there is such supplemental jurisdiction when the claim of an *unnamed* class member satisfies the amount-in-controversy requirement. For the reasons that follow, we reject this argument.

In its opposition to the second remand in this case, Chrysler argued that an individual plaintiff's request for rescission should be valued (for purposes of amount in controversy) at the full original price of the vehicles in question, and that as a

result, the claim of any class member owning more than three vehicles was likely to exceed $75,000. Chrysler then attached a declaration indicating that, according to its sales records, more than sixty potential class members in California owned more than nine Chrysler vehicles manufactured by the electrocoat process. But even if Chrysler is correct that several unnamed class members have claims for amounts in excess of $75,000, their claims do not provide a basis for diversity jurisdiction.

As discussed above, subsection (a) of § 1367 provides that a federal district court has supplemental jurisdiction over claims that are related to claims in "any civil action of which the district courts have original jurisdiction." "Original jurisdiction" in subsection (a) refers to jurisdiction established by looking for any claim in the complaint over which there is subject matter jurisdiction. But "original jurisdiction" does not refer to jurisdiction over claims not made-or not yet made-in the complaint. As also discussed above, a class action, when filed, includes only the claims of the named plaintiff or plaintiffs. The claims of unnamed class members are added to the action later, when the action is certified as a class under Rule 23. There thus cannot be "original jurisdiction" within the meaning of subsection (a) over the claims of unnamed class members and there is therefore no supplemental jurisdiction either.

Examining only the claims of named class plaintiffs for purposes of the amount-in-controversy requirement in diversity class actions mirrors the treatment of the complete diversity requirement. In both instances, subject matter jurisdiction depends only on the named plaintiffs. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 162 (2d Cir. 1987). We also note that practical considerations support this result. If the claim of an unnamed class member could support removal of the entire action, a removing defendant might be

entitled to discovery not merely from named, but also from unnamed, class members. Further, including the claims of unnamed class members is an "impractical and uncertain method of determining federal jurisdiction," *Tortola Rest., L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1190 n.4 (N.D.Cal. 1997), because those members are free to opt out of the class, and because a denial of class certification would prevent the court from taking jurisdiction over the claims of the unnamed class members. Either of these two events would deprive the district court of jurisdiction over the entire class action, and could occur well into the litigation, after the expenditure of substantial time and effort by the parties and the district court. *See id.*

Finally, there is no reported decision that supports Chrysler's argument that the claims of unnamed class members can serve as a basis for diversity jurisdiction. Even those courts that have held that § 1367 overrules *Zahn* state that diversity jurisdiction in class actions must be based on a claim of a named plaintiff. *See In Re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d at 607 ("At least one *named* plaintiff must satisfy the jurisdictional minimum.") (emphasis added); *see also Tortola Rest.*, 987 F. Supp. at 1190; *Amundson & Assocs. Art Studio, Ltd. v. Nat'l Council on Comp. Ins. Inc.*, 977 F. Supp. 1116, 1123 (D.Kan. 1997); *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947, 961 (D.Del. 1997). Secondary authorities agree. *See, e.g.*, 5 James Wm. Moore *et al.*, Moore's Federal Practice § 23.07[3][c] at 23-47 (3d ed. 1998) (hereinafter "Moore's") ("[E]ven if 28 U.S.C. § 1367 reverses *Zahn* . . . the statute does not permit supplemental jurisdiction over a class action in which *unnamed* class members meet the amount-in-controversy requirement, but the named plaintiff does not.") (emphasis in original).

3. Attorneys' Fees as a Basis for Amount in Controversy for Named Plaintiffs

Chrysler does not contend that any of the named plaintiffs in this case has an individual claim for damages that exceeds $75,000. Chrysler does contend, however, that the entirety of any award of attorneys' fees should be allocated to the named plaintiffs, and that this amount will exceed $75,000 per named plaintiff. We have no doubt that attorneys' fees would exceed $75,000 per named plaintiff in this case if removal to federal court were upheld and class certification were granted. But we do not agree with Chrysler that under California law an award of attorneys' fees in this class action would be allocated solely to the named plaintiffs.

This circuit specifically rejected Chrysler's argument almost twenty years ago, in *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365 (9th Cir. 1982). We articulated a single reason for our holding in *Goldberg:* allocating attorneys' fees solely to the named plaintiffs would "seriously undermine . . . the rule expressed by the Supreme Court in *Zahn*." *Id.* at 1367. However, because we hold today that § 1367 has overruled *Zahn*, we must take another look at *Goldberg*.

Abbott Laboratories provides a useful starting place. There, the Fifth Circuit held that the named plaintiffs' claims satisfied the amount-in- controversy requirement because the attorneys' fees were allocated solely to the named plaintiffs, or "representative parties," under Louisiana law. *Abbott Labs.* at 526; La. Code Civ. Proc. art. 595; La. Rev. Stat. § 51:137. In so holding, the Fifth Circuit concluded that *Goldberg*:

> sheds little light on the distinct policy choices behind Louisiana's decision regarding rights of recovery by class members. That a state chooses a set of rules that result in an award in excess of [the jurisdictional requirement] frustrates no policy of *Zahn*. Simply put, under the law of Louisiana the class representatives were entitled to fees.

> Their rights of recovery were not created by a judge's summing the discrete rights of class members.

Id. at 526-27.

In the case now before us, plaintiffs amended their complaints after the first remand to include claims under Cal. Civ. Proc. Code § 1021.5. That section states, in relevant part:

> Upon motion, a court may award attorneys' fees *to a successful party* against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

(Emphasis added). In its opposition to the second remand, Chrysler argued that the district court should attribute the § 1021.5 attorneys' fees only to the named plaintiffs. We disagree. Section 1021.5 states only that attorneys' fees go "to a successful party." In this respect, it is different from the Louisiana statute at issue in *Abbott Laboratories*, which states:

> The court may allow the *representative parties* their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

La. Code Civ. Proc. art. 595 (emphasis added).

California courts have stated that § 1021.5 awards are a "bounty" for plaintiffs who successfully litigate in the public interest, *see, e.g., Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.*, 60 Cal. App. 4th 1109, 1127, 71 Cal. Rptr. 2d 1 (1997), but they have not held that this "bounty" goes

only to named plaintiffs in a class action. We therefore hold that, under this California law at least, attorneys' fees are not awarded solely to the named plaintiffs in a class action, and that they therefore cannot be allocated solely to those plaintiffs for purposes of amount in controversy. *See Spielman v. Genzyme Corp.*, 251 F.3d 1, 8 (1st Cir. 2001) (refusing to allocate attorneys' fees in class action solely to the class representatives based on language in Massachusetts statute awarding attorneys fees to "petitioner" in a class action); *H & D Tire and Automotive-Hardware Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 330 (5th Cir. 2000) (same result for Connecticut statute awarding attorneys fees to "plaintiff" in a class action); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1080 & 1080 n.11 (11th Cir. 2000) (same result for Florida statutes awarding fees to "prevailing party" or "[a]ny person prevailing"); *Darden v. Ford Consumer Fin. Co.*, 200 F.3d 753, 758 n.4 (11th Cir. 2000) (same result for Georgia statute awarding fees to "any person who is injured").

We agree with Chrysler's argument that § 1367 provides supplemental jurisdiction over the jurisdictionally insufficient claims of unnamed class members if the named plaintiffs in the action have claims that satisfy the amount-in-controversy requirement. In that respect, we disagree with the district court. But because we hold that Cal. Civ. Proc. Code § 1021.5 requires any attorneys' fees awarded in this action to be divided among all members of the class, we do not agree that the named plaintiffs in this case satisfy the amount-in-controversy requirement. Since this is the sole argument advanced by Chrysler to show that the claims of the named plaintiffs satisfy the amount-in-controversy requirement, the district court did not err in finding that there was no supplemental jurisdiction under § 1367.

B. Aggregation of Claims

In addition to arguing that § 1367 authorizes subject federal jurisdiction, Chrysler also argues that, for some claims in this

case, the amount in controversy should be determined based on the aggregated value of those claims to all the class members. In particular, Chrysler argues that plaintiffs' claims for disgorgement and for punitive damages should be aggregated for purposes of the amount-in-controversy requirement. For the reasons that follow, we disagree.

1. Aggregation in General

The rule against aggregating the claims of multiple plaintiffs for purposes of determining the amount in controversy dates back at least to 1832. *See Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 148 (1832). More recently, in 1911, the Supreme Court held that two plaintiffs could not aggregate their claims arising out of distinct promissory notes payable to each plaintiff by the defendant. *See Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39 (1911). In the Court's words, "[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount." *Id.* at 40. The Court in *Troy Bank* also recognized an exception to the anti-aggregation rule that was nearly as old as the rule itself. "[W]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Id.* at 40-41 (citing *Shields v. Thomas*, 58 U.S. (17 How.) 3, 4-5 (1854)). Based on the exception, the Court held in *Troy Bank* that the two plaintiffs could aggregate their claims based on a vendor's lien that they owned jointly. *See Troy Bank*, 222 U.S. at 41; *see also Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Pinel v. Pinel*, 240 U.S. 594 (1916).

In *Snyder v. Harris*, 394 U.S. 332 (1969), the Supreme Court rejected an argument that recent amendments to Rule 23 had changed the rule to allow aggregation in class actions. It reiterated that aggregation to meet the amount-in-controversy requirement was permissible only "(1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims

against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* at 335. It noted that the limitation on aggregation in class actions stemmed not from Rule 23 but from the Court's interpretation of the phrase "matter in controversy" in the basic diversity statute, 28 U.S.C. § 1332. *See id.* at 336; *see also Zahn*, 414 U.S. at 299-301.

Our circuit has considered the anti-aggregation rule and the common interest exception in a number of cases. *See, e.g., Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 547 (9th Cir. 1984) (allowing aggregation of shareholders' claims for breach of fiduciary duty); *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977) (ban on aggregation applies to injunctive as well as compensatory relief); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 683 (9th Cir. 1976) (denying aggregation of claims against railroad because rights to exclude trespassers arose "from the status of each [plaintiff] as [an] individual"); *Potrero Hill Cmty. Action Comm. v. Housing Auth.*, 410 F.2d 974, 978 (9th Cir. 1969) (refusing to aggregate claims of tenants in a housing project because their claims arose "only from the status of each as individual lessee"); *Handy v. General Motors Corp.*, 518 F.2d 786, 787 (9th Cir. 1975) (refusing to aggregate actions for "excess depreciation" due to automobile manufacturing defects); *Skokomish Indian Tribe v. France*, 269 F.2d 555, 559 (9th Cir. 1959) (allowing aggregation of quiet title actions by tribe against numerous defendants).

The distinction between "separate and distinct" claims which cannot be aggregated, and "common and undivided" claims which can, is not always crystal-clear. *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000) (noting criticism of distinction as "arcane and confusing"); 14B Charles A. Wright *et al.*, Federal Practice and Procedure § 3704, at 127 (3d ed.1998) (describing aggregation rules as

being in a "very unsatisfactory state"); 5 Moore's § 23.07[3][b] at 23-40 (calling distinction "elusive"). But we think it clear in this case that plaintiffs' claims for disgorgement and punitive damages do not implicate a "common and undivided interest," and therefore may not be aggregated for purposes of amount in controversy.

2. Aggregation of Disgorgement Claims

Aggregation is appropriate only where a defendant "owes an obligation to the group of plaintiffs as a group and not to the individuals severally." *Morrison*, 228 F.3d at 1262 (citing *Eagle*, 769 F.2d at 546). This understanding of aggregation is implicit in the two decisions in our circuit in which we have allowed aggregation. In the first, *Eagle v. American Tel. & Tel. Co.*, we held that the claims of a corporation's shareholders for breach of fiduciary duty could be aggregated as a "common and undivided interest" because shareholders cannot normally bring suit individually, but must instead institute a derivative suit on behalf of the corporation as a whole. *See* 769 F.2d at 545-46. In the second, *Skokomish Indian Tribe v. France*, we allowed an Indian tribe to aggregate its quiet title actions against multiple defendants in order to satisfy the amount-in-controversy requirement that then existed for federal question jurisdiction under 28 U.S.C. § 1331. Because the land at issue was contiguous and had been given to the tribe in a single treaty, and all the defendants derived title from a single source, we held that aggregation was proper. *See* 269 F.2d at 559.

Eagle and *Skokomish Indian Tribe* are paradigm aggregation cases, each involving "a single indivisible res" and concerning "matters that cannot be adjudicated without implicating the rights of everyone involved with the res." *Gilman v. BHC Secs., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997) (quoting *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996)). In contrast to the claims in *Eagle* and *Skokomish Indian Tribe*, plaintiffs' disgorgement claims in

this case are each cognizable, calculable, and correctable individually. They rest on the common legal theory that Chrysler should give up the profit from its use of allegedly defective electrocoat finish techniques — a profit that can be separated into discrete and quantifiable sums attributable to each vehicle sold. Indeed, the amended complaint contends with some specificity that Chrysler made an additional profit of between $6.00 and $16.00 per vehicle by using the electrocoat technique. That sum can be traced to particular transactions involving individual plaintiffs, each of whom can sue Chrysler for disgorgement of this per-vehicle profit. *See Gilman*, 104 F.3d at 1423 (refusing to aggregate disgorgement claims that "could be adjudicated on an individual basis"); *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983) (refusing to aggregate where each plaintiff sought a "fixed sum"); *Potrero Hill*, 410 F.2d at 978 (refusing to aggregate claims of tenants in a housing project because their claims derived from individual leases).

Recovery by one plaintiff in this case would not, as a legal matter, either preclude or reduce recovery by another. *See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (ANPAC) v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 563 (5th Cir. 1993) (denying aggregation where "one plaintiff's recovery is neither dependent upon, nor necessarily reduced by, another's"). Combining plaintiffs' relatively small individual disgorgement claims into a class action may well be necessary or advantageous as a matter of litigation economics, but that does not mean that Chrysler has an undivided obligation to the class within the meaning of the aggregation rule. *Contrast Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 313-15 (1st Cir. 1969) (aggregating claims to money owed by racetracks pursuant to contract naming as beneficiary "the group of owners whose horses win purses"). If the aggregation rule were otherwise, the amount-in-controversy requirement would be satisfied in all large-scale but small-dollar class actions in

which individual litigation is difficult or impossible as a practical matter.

Chrysler argues alternatively that any court-ordered disgorgement would create a "common fund" that would satisfy the requirements of the aggregation exception. This argument mistakes the nature of the common fund, which is an artifact of litigation, not an intrinsic characteristic of the claims. We agree with the Second Circuit's view that "[s]uch a fund is created to facilitate the litigation process in virtually every class action, and has nothing necessarily to do with whether the plaintiffs shared a pre-existing (pre-litigation) interest in the subject of the litigation." *Gilman*, 104 F.3d at 1427.

3. Punitive Damages

It is well established that punitive damages are part of the amount in controversy in a civil action. *See Bell v. Preferred Life Assur. Society*, 320 U.S. 238, 240 (1943); *Goldberg*, 678 F.2d at 1367. Chrysler goes beyond that familiar proposition, however, and argues that punitive damages may be aggregated in a class action so that the totality of punitive damages, rather than the per-plaintiff share, constitutes the amount in controversy.

When Chrysler made this argument in its opposition to the first remand, the district court rejected it because none of the plaintiffs' legal claims supported an award of punitive damages under California law. After the first remand, plaintiffs amended their complaint to add a claim under California's Consumer Legal Remedies Act, which would support an award of punitive damages. *See* Cal. Civ. Code § 1780. Plaintiffs did not explicitly request punitive damages, but the potential for such damages may still be considered for purposes of amount in controversy. *See Bell*, 320 U.S. at 240-43. When Chrysler opposed the second remand, it asked the district court to reconsider its refusal to aggregate punitive damages in light of the amended complaint. The district court refused, citing

several district court opinions from our circuit holding that punitive damages in class action claims cannot be aggregated for purposes of amount in controversy. *See, e.g., Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1251 (D.Ariz. 1996); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 719 (C.D.Cal. 1995); *Smiley v. Citibank, N.A.*, 863 F. Supp. 1156, 1163 (C.D.Cal. 1993). We agree with the district court.

It is true that punitive damages are different in some respects from compensatory damages, but they do not represent a "common and undivided interest" of the class. Punitive damages do not compensate plaintiffs for harm suffered. Rather, they punish the defendant for the wrongful conduct that has already occurred, and they deter the current defendant and potential defendants from engaging in similar conduct in the future. *See* 6 B.E. Witkin, *Summary of California Law*, Torts § 1327 at 785 (9th ed.1988). Because punitive damages do not compensate for harm, plaintiffs cannot calculate with precision the amount of any potential punitive damage award attributable to each class member. Moreover, the amount of the punitive damage award may well be influenced by the presence of a large class of plaintiffs, each of whom was wronged by the defendant in the same way.

Class members share an interest in a punitive damage award only because they have joined together for the purpose of litigation. This shared interest has "nothing to do with whether prior to litigation they jointly held a single title or right in which each possessed a common and undivided interest." *Gilman*, 104 F.3d at 1430. It is undisputed that the plaintiffs in this case could sue Chrysler individually on all the causes of action alleged in the current complaint. If they did so, nothing would preclude them from seeking and recovering punitive damages individually. This potential for multiple liability directly refutes the argument that there is some unitary res to which the plaintiffs jointly claim a right. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d at 608-09. Just

as in their claim for compensatory damages, plaintiffs join together as a class to assert punitive damages primarily as a matter of "convenience and economy." *Troy Bank*, 222 U.S. at 40.

We recognize that under California law one plaintiff's recovery of punitive damages can affect the amount recovered by another plaintiff against the same defendant. *See, e.g., Delos v. Farmers Group*, 93 Cal. App. 3d 642, 667, 155 Cal. Rptr. 843 (Cal. Ct. App. 1979). But this does not, in our view, alter the "separate and distinct" nature of the claims. Some courts have suggested that an identifying characteristic of "common and undivided" claims is that one plaintiff's failure to collect would increase the recovery of the remaining plaintiffs, *see, e.g., Sellers v. O'Connell*, 701 F.2d at 579, but we believe this expansive definition would undercut the rationale of *Snyder v. Harris*. The *Snyder* plaintiffs argued that since their entire class would be bound by the court's judgment, the phrase "matter in controversy" therefore must extend to encompass "all the claims of the entire class." 394 U.S. at 337. The Supreme Court responded that while it was equally true that joined plaintiffs (as well as class action plaintiffs) were each bound by a court's judgment, it was "in joinder cases of this very kind that the doctrine that distinct claims could not be aggregated was originally enunciated." *Id.* (citing *Troy Bank* and *Pinel*). Because the rationale for joinder is the possible effect of the proceeding on the party sought to be joined, we infer from the Court's statement that a party cannot show that claims are "common and undivided" simply by showing that the success of one plaintiffs' individual claim would affect the recovery of another.

Other circuits have in the past been willing to aggregate punitive damage claims for purposes of determining the amount in controversy. In particular, two circuit court opinions adopted (at least for a time) Chrysler's position, holding that punitive damage awards were the "common and undivided

interest" of a group of plaintiffs. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995). *Tapscott* and *Allen* both rested in large part on the fact that, in their respective states, punitive damage awards could be characterized as fundamentally collective.

But *Tapscott* and *Allen* no longer appear to be good law even in their own circuits. *Tapscott* was overruled last year in *Cohen v. Office Depot, Inc.*, 204 F.3d at 1072 (concluding that *Tapscott* erred in departing from *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978) (prohibiting aggregation of punitive awards), which governs the Eleventh Circuit as a pre-split decision of the Fifth Circuit); *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1300 (11th Cir. 2001); *Morrison*, 228 F.3d at 1264. The *Allen* panel cut back on its own holding in its denial of a petition for rehearing when it stressed that the holding was "not to be construed as a comment on any similar case that might arise under the law of any other state." 70 F.3d at 26; *see also Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 601 (5th Cir. 1998) (refusing to aggregate punitive damages based on limited holding of *Allen*). And recently, the Fifth Circuit has disclaimed *Allen's* holding outright. *See H & D Tire*, 227 F.3d at 330 (holding that *Lindsey* is the rule of the Fifth Circuit). At present, all of the circuits that have considered the issue appear to agree: punitive damages cannot be aggregated and attributed in total to each member of a class action for purposes of the amount-in-controversy requirement. *See Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1293 (10th Cir. 2001); *Gilman*, 104 F.3d at 1430-31; *Anthony v. Security Pac. Fin. Servs., Inc.*, 75 F.3d 311, 315 (7th Cir. 1996).

C. Establishment of Amount in Controversy as a Discovery Sanction

Chrysler makes one final argument as to why the amount-in-controversy requirement was satisfied in this case.

It argues that plaintiffs' unwillingness to respond to discovery requests in state court entitled it to a factual finding by the district court that the amount in controversy was satisfied. In essence, Chrysler argues that the district court should have issued a discovery sanction in the form of a ruling that the amount-in-controversy requirement was satisfied.

Chrysler sought discovery relevant to the question of amount in controversy in federal court after the first removal, but the district court refused to grant such discovery. Chrysler then unsuccessfully sought mandamus from this court on that issue. Chrysler did not seek discovery in federal court after the second removal, and the sanction and fee award entered in connection with the second remand were unrelated to discovery in federal court.

Discovery is available in federal court to establish the presence of personal jurisdiction in that court, *see, e.g., Butcher's Union Local No. 498, United Food & Comm'l Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) ("Discovery should ordinarily be granted where 'pertinent facts bearing on the question of [personal] jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.'") (citation omitted), and some courts have suggested that it may be appropriate to allow discovery relevant to jurisdictional amount prior to remanding, *see, e.g., McCraw v. Lyons*, 863 F. Supp. 430, 435 (W.D.Ky. 1994). But that issue is not now before us. Rather, the question before us is whether plaintiffs' unwillingness to respond to discovery requests in *state court* provided a basis for a federal court to make an adverse factual finding against plaintiffs.

It is true that an appropriate discovery sanction for refusing to respond to discovery requests on jurisdictional facts can be an adverse finding on the factual issue. For example, in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Supreme Court sustained a sanction that found the facts necessary to establish personal

jurisdiction over a recalcitrant defendant. Although we have not found a case directly on point, we see no reason why a court cannot, in an appropriate case, sanction a defendant who refuses to respond to appropriate discovery requests on a fact relevant to subject matter jurisdiction by entering an order establishing that fact as true.

Subject matter jurisdiction cannot be established by consent of the parties, and a lack of subject matter jurisdiction is a non-waivable defect. *See, e.g., Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978). But a sanction in the form of an adverse factual finding rests on neither consent nor waiver. Rather, it rests on the reasonable assumption that the party resisting discovery is doing so because the information sought is unfavorable to its interest. In such a case, the sanction merely serves as a mechanism for establishing facts that are being improperly hidden by the party resisting discovery. *See* Fed. R. Civ. P. 26(g)(3), 37(b)(2)(A); *Chilcutt v. United States*, 4 F.3d 1313, 1324 (5th Cir. 1993).

In this case, however, the discovery abuse, if any, did not take place in the district court. Rather, it took place in California Superior Court. We are unaware of any authority, and Chrysler has supplied none, suggesting that a federal district court can sanction discovery abuse in state court when that court has neither found nor sanctioned such abuse itself. We therefore agree with the district court that it could not sanction plaintiffs for their failure to comply with Chrysler's state court discovery requests by finding the facts necessary to establish diversity jurisdiction.

IV. The District Court's Order

Based on the foregoing, we conclude that the district court was correct to reject Chrysler's arguments in opposition to the second remand. We now address the district court's award of sanctions and attorneys' fees.

A. Sanctions Under Rule 11

Federal Rule of Civil Procedure 11(b) states that an attorney or unrepresented party who presents a motion, pleading, or other paper to the district court "is certifying to the best of the person's knowledge" that, among other things:

> the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]

Rule 11(c) states that a district court may impose sanctions upon a party that violates any of the provisions of subsection (b).

The district court awarded sanctions based on Chrysler's second removal. In the words of the district court, "in reviewing the arguments presented by Chrysler in its notice for removal and in response to plaintiffs' motion for remand, this court finds that Chrysler in large part raised arguments that were clearly frivolous in light of this court's July 20 order and the decisions of other courts in the Ninth Circuit." Although the district court did not specifically mention Rule 11(b)(2), its use of the word "frivolous" indicates that its award of sanctions was based on its belief that Chrysler had violated this provision of the Rule.[6] We review a district court's decision to award sanctions under Rule 11 for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Under the circumstances, we reverse the award of sanctions against Chrysler. On the record in this case, we are sympathetic with the district court, which was forced by a

---

[6]We note that the district court's order appears to sanction defendant Chrysler for a violation of Rule 11(b)(2), even though Rule 11(c)(2)(A) states, "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)." Chrysler has not raised this argument on appeal, and we therefore consider it waived.

persistent defendant to revisit nearly identical legal issues. At the same time, however, we recognize the difficulties faced by parties who seek to advance novel legal arguments in opposition to remand. Because of the general bar upon direct appellate review of district court remand orders, *see* 28 U.S.C. § 1447(d), Chrysler was forced either to abide by the district court's view of the law without an authoritative ruling from this circuit, or to risk sanctions by reiterating its arguments. We find it important that Chrysler's core argument—that supplemental jurisdiction can extend to the jurisdictionally insufficient claims of unnamed class members in a diversity class action—was a live issue both at the time of the second notice of removal and at the time of the district court's order granting sanctions.

Chrysler's second notice of removal was dated March 5, 1999, and the district court issued its sanctions order on May 28, 1999. By this time, the circuit split on the question of whether the Judicial Improvement Act of 1990 had overruled *Zahn* was not only well established, *see Meritcare*, 166 F.3d at 214 (1999); *Leonhardt*, 160 F.3d at 631 (1998); *Stromberg Metal Works*, 77 F.3d at 928 (1996); *Abbott Laboratories*, 51 F.3d at 529 (1995), but also a matter of vigorous debate in both practitioner and academic journals. *See, e.g.*, Supplemental Jurisdiction Update, 14 No. 4 *Federal Litigator* 4 (Jan.1999) (advising attorneys that until the Supreme Court revisits *Zahn*, "the question will remain open"); Richard D. Freer, *Toward a Principled Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 Ind. L.J. 5, 18 & n.79 (1998) (noting that "courts have not reached a consensus" on the effect of the amended § 1367, but that "[t]he overwhelming majority of academic commentary has criticized *Zahn* "). This court, of course, had not yet decided the question.

We therefore cannot agree with the district court that the arguments advanced in Chrysler's second notice of removal

were "clearly frivolous." Indeed, we note that the Supreme Court granted certiorari on *Abbott Laboratories*, albeit after the district court's order in this case, *see* 120 S. Ct. 525 (1999), and eventually affirmed the Fifth Circuit's position without opinion by an equally divided Court. *See* 120 S. Ct. 1578 (April 3, 2000). We believe that sanctioning a defendant for making (or even for repeating) a plausible argument that has failed previously in district court when the failure to make (or to repeat) that argument will potentially have the consequence of depriving the defendant of a favorable ruling from an appellate court is not an appropriate use of the sanction power. *Cf. Patrick v. Burget*, 486 U.S. 94 (1988); *Lim v. Cent. DuPage Hosp.*, 972 F.2d 758 (7th Cir. 1992); *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122 (7th Cir. 1986). We therefore hold that the district court abused its discretion in sanctioning Chrysler in this case.

B. Attorneys' Fees Under § 1447(c)

The district court ordered Chrysler to pay plaintiffs' attorneys' fees in connection with their second motion to remand. *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). We review attorneys' fee awards for abuse of discretion. *K.V. Mart Co. v. United Food & Comm'l Workers Int'l Union, Local 324*, 173 F.3d 1221, 1223 (9th Cir. 1999). Under that standard, we affirm both the district court's award of fees and its calculation of their amount.

Because the standards for Rule 11 sanctions and § 1447(c) fee awards differ, our affirmance of attorneys' fees is not inconsistent with our reversal of sanctions. The standard for awarding attorneys' fees under § 1447(c) is "something less than that required for an award of attorney's fees under Rule 11." 16 Moore's § 107.41(3)(b) at 107-218.6; *see Moore v. Permanente Med. Group*, 981 F.2d at 446-47 (§ 1447(c) does not mirror Rule 11 because it is not punitive and does not

require bad faith). Although we "must reverse an award of attorneys' fees if the district court's exercise of discretion was grounded in a determination of law that we reject," *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000), we have rejected only one of the legal determinations made by the district court in this case, and that rejection does not result in a determination that the remand order was incorrect. The court's remand order was correct as a matter of law, and we affirm its order awarding attorneys' fees. *See Balcorta*, 208 F.3d at 1112 (affirming fee award based on district court's correct decision to remand).

Chrysler also appeals the amount of the attorneys' fee award on the ground that plaintiffs' attorneys submitted insufficient documentation to support their fee request. However, plaintiffs' attorneys submitted supporting affidavits, and the district court explicitly found the fee requests sufficiently modest that more detailed documentation was unnecessary. We therefore find that the district court did not abuse its discretion in calculating the amount of the § 1447(d) fee award in this case.

REVERSED in part, AFFIRMED in part, and REMANDED. Each side to bear its own costs on appeal.

UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT CALIFORNIA.

Ursula GIBSON and Mary DePina, individually on behalf of themselves and all

others similarly situated, Plaintiff,

v.

CHRYSLER CORPORATION, and Does 1 through 500, inclusive, Defendants.

Paul MALDONADO, individually on behalf of himself and all others similarly

situated, Plaintiff,

v.

CHRYSLER CORPORATION, and Does 1 through 500, inclusive, Defendants.

Stephen DePALMA, individually on behalf of himself and all others similarly

situated, Plaintiff,

v.

CHRYSLER CORPORATION, and Does 1 through 500, inclusive, Defendants.

No. C-99-1047 MHP, C-99-1048 MHP, C-99-1049 MHP.

May 28, 1999.

MEMORANDUM AND ORDER

PATEL, Chief J.

On January 29, 1999, pursuant to order of the state court, plaintiffs filed their First Amended Consolidated Complaint ("Complaint") against the Chrysler Corporation[1] ("Chrysler") alleging: (1) breach of express warranty under California Commercial Code section 2313; (2) willful breach of express warranty under the California Song Beverly Consumer Warranty Act ("Song Beverly Act"), Cal. Civ. Code § 1794; (3) unfair and fraudulent business practices under California Business & Professions Code sections 17200 *et seq.;* (4) deceptive practices in violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.;* and (5) equitable relief. As relief, plaintiffs request restitution of all amounts paid by plaintiffs and putative class members and/or disgorgement of Chrysler's profits pursuant to Business and Professions Code section 17203, actual damages, compensatory damages, attorneys' fees and other equitable relief, Plaintiffs seek to represent the putative class of all persons or entities in the State of California who were present or former owners or lessees of Chrysler vehicles manufactured between 1986 through the present model that were finished with an "electrocoat" that fails to properly bond with the underlying primer so that they are subject to delamination.

On March 5, 1999, Chrysler removed these actions to federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a).[2] These actions were subsequently related and

---

[1]Defendant Chrysler Corporation has recently changed its name to DaimlerChrysler Corporation. However, for the sake of brevity and continuity, the court will continue to refer to the defendant as "Chrysler."

[2]As noted in this court's previous order, the diversity of the parties is not in dispute. Plaintiffs are citizens of California and Chrysler is a citizen of

(continued...)

assigned to this court. Now before the court is plaintiffs' motion to remand to state court, motion for attorneys' fees and costs, and motion for sanctions pursuant to Federal Rule of Civil Procedure 11. Chrysler likewise brings a motion for leave to conduct jurisdictional discovery. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

On March 6, 1998, plaintiffs Ursula Gibson and Mary DePina filed a class action in the Superior Court for the County of San Francisco against defendant Chrysler alleging (1) breach of express warranty under California Commercial Code section 2313; (2) willful breach of warranty under the Song Beverly Act, Cal. Civil Code § 1794; and (3) unfair and fraudulent business practices under California Business and Professions Code section 17200 *et seq.* ("Unfair Competition Act"); (4) breach of contract; and, (5) a claim for equitable relief. The complaint further stated that damages for each named plaintiff and member of the putative class would not exceed $75,000. Plaintiffs sought to represent a putative class of present and former owners and lessees of Chrysler vehicles manufactured between 1986 and 1997 "that were finished with paint that fails to properly bond with the underlying primer so that they are subject to delamination." Plaintiffs Stephen DePalma and Paul Maldonado separately filed complaints in the Superior Court for the County of San Francisco and the Superior Court for the County of Alameda on March 27, 1998, and on April 1, 1998, respectively. The complaints filed by DePalma and Maldonado were essentially the same as that filed by Gibson and DePina,

---

[2](...continued)
Delaware, its state of incorporation, and Michigan, its principal place of business. *See Gibson v. Chrysler Corp.*, C- 98-1462 MHP, slip op., at 3 n.3 (N.D.Cal. July 20, 1998).

but included an additional cause of action for breach of contract.

In April 1988, Chrysler removed each of the state court actions to federal court based on diversity jurisdiction and they were subsequently related and assigned to this court. *See Gibson v. Chrysler Corp.*, C-98-1462 MHP, slip op. (N.D.Cal., July 20, 1998) ("July 20 order"). Upon removal, Chrysler petitioned the court for leave to conduct jurisdictional discovery, which was denied by the court on May 22, 1998. *See Gibson*, C-98-1462 MHP, slip op. (N.D.Cal., May 26, 1998) (noting that "a motion to remand going to the very jurisdiction of the court shall be heard before any other motions"). Subsequently, upon plaintiffs' motion to remand, the court remanded these actions to state court for failure to meet the requisite $75,000 amount in controversy requirement for federal diversity jurisdiction. *See generally* July 20 order. In reaching this conclusion, the court thoroughly addressed and rejected several arguments raised by Chrysler, holding that: (1) the actual damages sought by plaintiffs could not be aggregated to meet the amount in controversy requirement; (2) although not clearly settled law, the aggregation of punitive damages was not warranted; (3) Chrysler had failed to establish that plaintiffs' claims compried "an" undivided interest or that any individual claim exceeds $75,000 even if plaintiffs' damages were paid from a common fund; and (5) attorneys' fees could not be aggregated to meet the amount in controversy requirement in class actions. *See* July 20 order, at 4, 6, 7 & 8.

On August 20, 1998, the U.S. Court of Appeals for the Ninth Circuit denied Chrysler's petition for a writ of mandamus to review this court's decision to remand each of the state court actions and to deny leave to conduct jurisdictional discovery. *See* Saveri Decl., Exhs. 8 & 9. Shortly afterwards, Chrysler filed a notice of appeal with the Ninth Circuit seeking appellate review of this court's remand order and denial of request for leave to conduct jurisdictional discovery. Upon

plaintiffs' motion, the Ninth Circuit dismissed Chrysler's appeal for want of jurisdiction. *See id.* at Ex. 11.

Meanwhile, in state court, Chrysler served plaintiffs with various requests for admissions and interrogatories seeking to elicit information similar to the jurisdictional discovery sought in federal court. *Id.* at Exs. 11-13. In response, plaintiffs objected to Chrysler's various requests as being irrelevant and moot subject to the coordination of the three Chrysler paint cases. *Id.* at Ex. 13. Subsequently, the three actions were coordinated in state court and plaintiffs filed a First Amended Consolidated Complaint, as described above. Notably, the Complaint is nearly identical to the initial individual complaints filed by Gibson and DePina, Maldonado, and DePalma, except that the Complaint added a CRLA cause of action and eliminated the breach of contract claim. *Id.* at Ex. 14. Plaintiffs allege in the Complaint that "plaintiffs and each class members' individual claim will be worth on average less than $30,000, inclusive of attorneys' fees and damages." Compl., ¶ 10. After coordination, Chrysler sought to compel answers to its requests for jurisdictional discovery through numerous correspondences, telephone calls, and finally, by motion to compel before the state court. The state court conducted a telephone conference on Chrysler's motion to compel, and on March 4, 1999, denied Chrysler's motion to compel plaintiffs to respond to jurisdictional discovery. *Id.* at Ex. 18.

With the one-year deadline for removal of state court actions to federal court impending, Chrysler again removed plaintiffs' action to federal court on March 5, 1999. In its notice of removal, Chrysler alleges that it is unable to "firmly" establish the amount in controversy, but "removes this case based on the information available to it at this time." Saveri Decl., Ex. 19 ("Notice of Removal"), ¶ 16.

LEGAL STANDARD

V. I. Remand

As a general rule, an action is removable to a federal court only if it might have been brought there originally. 28 U.S.C. § 1441(a). Federal diversity jurisdiction requires both complete diversity of the parties and an amount in controversy exceeding $75,000, 28 U.S.C. § 1332(a). The removal statute is strictly construed, and the court must reject federal jurisdiction if there is any doubt as to whether removal is proper. *Duncan v. Stuctzlc,* 76 F.3d 1480, 1485 (9th Cir. 1996). The defendants bear the burden of proving the propriety of removal. *Id.* Where the jurisdiction of the court is challenged, the party invoking federal jurisdiction bears the burden of demonstrating that its jurisdictional allegations are supported by competent proof. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). If at any time before final judgment the court determines that it is without subject matter jurisdiction, the action shall be remanded to state court. 28 U.S.C. § 1447(c).

II. Federal Rule of Civil Procedure 11 Sanctions

Federal Rule of Civil Procedure 11 requires a court to impose sanctions on an attorney, a represented party, or both, when the attorney has signed and submitted to the court a pleading, motion or other paper that is not, to the attorney's knowledge and belief after reasonable inquiry, "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. An attorney's signature also constitutes a warranty that the paper is not "interposed for any improper purpose, such as to harass or to cause unnecessary delay." *Id.*

The standard for determining whether a pleading, motion or other paper is either frivolous or interposed for an improper purpose is one of objective reasonableness at the time of the attorney's signature. *Corm v. CSO Boriorquez,* 967 F.2d 1418,

1421 (9th Cir. 1992) (citing *Woodrum v. Woodward County Okla.*, 866 F.2d 1121, 1127 (9th Cir. 1989); *Golden Eagle Dist. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986)), *reh'g denied en banc*, 809 F.2d 584 (1987). In assessing whether the filing of a particular paper was frivolous under Rule 11, the court should not consider the ultimate failure on the merits or the subjective bad faith of the signer, but rather whether the position taken was "legally unreasonable" or "without factual foundation." *Zalvidar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

DISCUSSION

In plaintiffs' motion to remand, the court once again must face Chrysler's contention that the amount in controversy requirement has been satisfied for a host of reasons. In its opposition to plaintiffs' motion to remand as well as in its own motion for leave to conduct jurisdictional discovery, Chrysler further asserts that this action should not be remanded to state court, even if it is unable to establish the amount in controversy requirement, until it has been able to conduct the jurisdictional discovery that it requests. The court therefore first addresses plaintiffs' motion to remand and Chrysler's motion for leave to conduct jurisdictional discovery. Because the court finds in favor of plaintiff on these motions, the court then turns to plaintiffs' motions for attorneys' fees and sanctions.

I. Motion to Remand

Although little has changed factually since Chrysler's previous attempt to remove these actions to federal court, it nonetheless asserts that this removal action differs in certain respects from the previous removal attempt. Chrysler contends that plaintiffs' motion should be denied because (1) plaintiffs' refusal to admit in state court that they will not seek less than the jurisdictional amount establishes that the amount in controversy is greater than $75,000; (2) a potential award of attorneys' fees must be attributed to the named plaintiffs; (3)

plaintiffs' request for disgorgement meets the jurisdictional minimum; (4) the claim for rescission constitutes an element of the amount in controversy; (5) the potential punitive damages are sufficient to meet the amount in controversy; (5) putative class members who are owners or lessees of multiple vehicles meet the amount in controversy requirement; and (6) the court is able to exercise supplemental jurisdiction over this action if at least one plaintiff's claim exceeds the jurisdictional minimum.

A. Pecuniary Damages

Chrysler claims that plaintiffs' allegation that the amount in controversy is "on average less than $30,000, inclusive of attorneys' fees and damages" fails to take into account the effect of plaintiffs' multiple claims for relief, including restitution, disgorgement of profits, and equitable relief. The court takes up each of Chrysler's arguments in turn.

In the class action context, the removing party must prove that each plaintiff and every class member has an amount in controversy in excess of $75,000. *See Snyder v. Harris*, 394 U.S. 332, 338 (1969); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973). In determining whether the damages pled by the plaintiffs satisfy the amount in controversy requirement for diversity jurisdiction, the damages asserted in the complaint must be accepted as true if claimed in good faith. 28 U.S.C. § 1332(a). "If it is unclear what amount of damages the plaintiff has sought, . . . then the defendant bears the burden of actually proving the facts to support jurisdiction, including the jurisdictional amount." *Gans v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). As a general rule, the separate and distinct claims of class action plaintiffs cannot be aggregated to reach the $75,000 jurisdictional requirement. *Snyder*, 394 U.S. at 336-37. Aggregation is permissible, however, when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* at 335. The Ninth Circuit has held that claims are only common and

undivided if they derive from rights that plaintiffs hold in group status, or they relate to a single *res* such as an estate or an insurance policy. *Eagle v. AT & T Co.*, 769 F.2d 541, 546 (9th Cir. 1985).

Plaintiffs allege in their complaint that "plaintiffs and each class members' individual claim will be worth on average less than $30,000, inclusive of attorneys' fees and damages." Compl., ¶ 10. Furthermore, in its notice of removal, Chrysler concedes that it is unable to "firmly" establish the amount in controversy, but "removes this case based on the information available to it at this time." Notice of Removal, ¶ 16. Without more, the court must remand this action to state court for lack of subject matter jurisdiction. *See Gaus*, 980 F.2d 566 ("strong presumptions against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper"). As noted in *Gaus*, Chrysler's allegations, "although attempting to recite some 'magical incantation,' fails to dispel the 'strong presumption' against removal jurisdiction." *See id.* at 567.

Although Chrysler does not allege that the amount of damages pled by plaintiffs was done in bad faith, it initially asserts that plaintiffs' refusal to respond to jurisdictional discovery sought by Chrysler is tantamount to an admission that the damages they actually seek exceed $75,000. *See Sharp Elec. Corp. v. Copy Plus, Inc.*, 939 F.2d 513, 515 (7th Cir. 1991) (holding jurisdiction proper where plaintiff admitted that punitive damages are not readily ascertainable, but may exceed $50,000). Plaintiffs' failure to satisfactorily respond to Chrysler's jurisdictional discovery requests does not shift the burden to plaintiffs to establish that jurisdiction is not proper. In essence, Chrysler attempts to evade its burden to establish that the $75,000 jurisdictional minimum by placing the onus upon plaintiffs. Conclusory allegations, unsupported by facts, are insufficient to support an assertion in the removal notice

that the amount in controversy exceeds $75,000. *Gaus*, 980 F.2d at 567.

Chrysler next argues that plaintiffs will have a "common and undivided interest" not attributable to the class members if plaintiffs prevail and Chrysler is ordered to disgorge its profits. Plaintiffs allege that Chrysler saved $6 to $16 per vehicle by substituting an electrocoat for a previously used coating process. Compl., ¶ 18. According to plaintiffs, the total cost savings for Chrysler amounted to over $10,000,000 for 1996 alone at an average cost saving of $10 per vehicle. *Id.* ¶ 18 n.3. Citing to the July 20 order, Chrysler now contends that this court dealt only with the remedy of restitution, and not disgorgement, in holding that the establishment of a common "paint correction fund" from which present and future class members will be compensated "does not transform the plaintiffs' individual rights into jointly-held rights." July 20 order, at 2 and 6-7.

Chrysler is mistaken in so limiting the court's prior holding. In reaching the question of whether the damages and other relief sought by plaintiffs constituted a common and undivided interest attributable to the named plaintiffs, the court noted that plaintiffs sought "restitution of all amounts paid by plaintiffs and class members, and/or disgorgement of Chrysler's profits." July 20 order, at 2. The court further noted that "[i]njunctive and restitutive remedies available under section 17203 'are designed to prevent unfair business practices and to require disgorgement of money or property obtained by means of such practices.'" July 20 order, at 5 (citing *State Farm Fire and Cas. Co. v. Superior Court for the County of Los Angeles*, 45 Cal. App. 4th 1093, 1110 (1996), *abrogated on other grounds, Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163,___, 83 Cal. Rptr. 2d 548, 561 (1999)). As such, the issue of whether both restitution and disgorgement are separate and distinct rights for the purposes of calculating the amount in controversy was before the court.

Nonetheless, Chrysler's contentions are easily dismissed. The court notes that disgorgement is a form of equitable relief. *See Arnold v. General Motors Corp.*, 1998 WL 827726, *2 (N.D.Cal., Nov. 18, 1998) (Illston, J.). "[W]here the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief." *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977) (internal citation and quotations omitted). The *Snow* court further noted that "the proper focus in this case is not influenced by the type of relief requested, but rather continues to depend upon the nature and value of the right asserted." *Snow*, 561 F.2d at 790. In *Arnold*, the court rejected GM's argument that the equitable remedy of disgorgement created a common and undivided interest for purpose of amount in controversy requirement because the remedy of disgorgement was aimed at the conduct of the defendant "as a whole." *Arnold*, 1998 WL at *2. As such, plaintiffs' claims for disgorgement cannot be aggregated and, even if cumulative with plaintiffs' other remedies, amounts to the paltry sum of between $6 and $16 per vehicle.

Chrysler also contends that the court must add the availability of rescission to the mix of cumulative remedies sought by plaintiffs. Plaintiffs pray "for costs and expenses of replacing or repurchasing all Chrysler vehicles." Compl., ¶ 91(b). Thus, Chrysler asserts that in determining the amount in controversy the court must include the value of the purchase price of the vehicle. In doing so, defendant contends that "[b]ecause many of the vehicles at issue cost over $25,000. . . . plaintiffs' claim of rescission goes a long ways towards satisfying the amount in controversy requirement." *See* Slates Decl. [Herzog Decl, Ex. R], ¶ 2. Again, as above, rescission is a form of equitable relief subject to the anti-aggregation principle set forth in *Snow*. As this court noted in its prior order, Chrysler has offered no facts to suggest that the actual damages sought are common and indivisible, and as such, the ban on aggregation applies to plaintiffs' rescission claims.

Moreover, Chrysler provides nothing more than the conclusory allegation that the "claim of rescission alone would satisfy the amount in controversy" for each plaintiff that owns or leases more than three Chrysler vehicles.

Finally, Chrysler asserts that the court should exercise supplemental jurisdiction over this action because class members who own multiple vehicles clearly meet the amount in controversy requirement. In doing so, Chrysler points to evidence which establishes that over 60 individuals and entities in the State of California have an interest in nine or more Chrysler vehicles covering model years 1987 to present. Wolenberg Decl. [Herzog Decl., Ex. S], ¶¶ 2-3. It reasons that if the court is able to exercise jurisdiction over any one of these entities or individuals it should be able to exercise jurisdiction over the class action.

In support of its argument, Chrysler points to *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930 (7th Cir. 1996), and *In re Abbott Labs.*, 51 F.3d 524, 527-29 (5th Cir. 1995), as authority for the exercise of supplemental jurisdiction if some of the putative class members satisfy the jurisdictional minimum. Both the *Abbott* and *Stromberg* courts examined the effect of the 1990 revisions to 28 U.S.C. section 1367 on the availability of supplemental jurisdiction in class actions. The *Abbott* court reasoned that the absence of class actions in "the list of enumerated exceptions to supplemental jurisdiction [, 28 U.S .C. § 1367,] necessarily meant that class actions were subject to district courts' supplemental jurisdiction and, therefore, compliance with the amount in controversy requirement for all class members was unnecessary so long as some class members satisfied the requirement." *Daniels v. Philip Morris Cos., Inc.*, 18 F. Supp. 2d 1110, 1114 (S.D.Cal. 1998) (citing *Abbott*, 51 F.3d at 528-29) (holding that no supplemental jurisdiction available in class actions). The Seventh Circuit in *Stromberg* later adopted the reasoning of *Abbott*, *Stromberg*, 77 F.3d at 930-31.

However, in pointing to *Stromberg* and *Abbott*, Chrysler fails to note "the chorus of courts which have reaffirmed the vitality of *Zahn*." *See Daniels*, 18 F. Supp. 2d at 1114. The court need not reiterate the analyses of this consonance of California district courts, except to note that it is not persuaded by Chrysler's arguments. Because the claims of each class member must individually satisfy the amount in controversy requirement, as held in *Zahn*, the court finds that the fact that certain class members have suffered damages in excess of $75,000 is insufficient to meet the amount in controversy requirement.

B. Punitive Damages

In contrast to the prior removal action, Chrysler maintains that plaintiffs now allege a cause of action which allows for the recovery of punitive damages. In the prior removal action, the court noted that plaintiffs' claims under the Song Beverly Act and the Unfair Competition Act, Cal. Bus. and Prof. Code § 17203, did not provide for punitive damages, and as such, held that there could be no punitive damages to aggregate to meet the amount in controversy requirement.

Now, Chrysler contends that plaintiffs' CLRA cause of action allows for the recovery of punitive damages, and that the court should revisit its consideration of the issue in its July 20 order. In doing so, Chrysler concedes that plaintiffs have not requested punitive damages, but argues that such requested relief can easily be added given that leave to amend is freely granted in California. Chrysler, however, has offered no proof that even if punitive damages were sought and awarded, such an award would exceed the $75,000 baseline. Rather, it maintains that any prayer for punitive damages, standing alone, is sufficient to meet the amount in controversy requirement.

In support of its argument, Chrysler again raises almost identical arguments as it did in its prior removal action based on *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir.

1995), *reh'g denied,* 70 F.3d 26 (5th Cir. 1998) (per curiam), and *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996), despite this court's prior determination that each of these cases were of limited applicability. *See* July 20 order, at 6 and n.6.[3] In its lengthy argument that punitive damages are a "common and undivided" interest for the purpose of the satisfying the amount in controversy requirement, Chrysler fails to mention either this court's prior consideration of the issue or to even attempt to distinguish the numerous California federal district court cases which have clearly held that punitive damages sought in a class action cannot be aggregated to meet the jurisdictional minimum. In again reviewing the case law and Chrysler's arguments, the court finds that Chrysler fails to establish that plaintiffs' claims for punitive damages constitute a "common and undivided" interest which must be aggregated for the purposes of determining the jurisdictional minimum.

In its prior order, the court noted that the federal courts are required to include potential punitive damages, as well as pecuniary damages, in determining the amount in controversy when punitive damages are permitted by statute. *See* July 20 order, at 6 (citing *Bell v. Preferred Life Assur. Soc. of*

---

[3]In denying rehearing *en banc* in *Allen,* the Fifth Circuit limited its earlier determination that punitive damages are a single, collective right in which class members have a common and undivided interest to apply to the law of Mississippi only. *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995), *reh'g denied,* 70 F.3d 26 (5th Cir. 1998) (per curiam). In doing so, the court stated that "the panel is of the unanimous view that the opinion in this case reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state." *Allen,* 70 F.3d at 26. Similarly, although the Eleventh Circuit has also held that punitive damages are fundamentally collective, it has done so in the context of a narrow set of facts, and specifically refused to formulate a general rule on aggregation of punitive damages. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358-59 (11th Cir. 1996).

Montgomery, 320 U.S. 238, 240 (1943)). As a general rule, the "separate and distinct" claims of class action plaintiffs cannot be aggregated to reach the $75,000 jurisdictional requirement. *Snyder*, 394 U.S. at 336-37. Aggregation is permissible only when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* at 335. Although the Ninth Circuit has not considered whether punitive damages may be aggregated to satisfy the amount in controversy, several California district courts have squarely faced the issue and have held that punitive damages sought in a class action cannot be aggregated to meet the jurisdictional minimum. *Villareal v. Chrysler Corp.*, 1996 WL 116832, *3 (N.D.Cal., March 11, 1996) (Smith, J.); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 719 (C.D. Cal. 1995); *Harris v. Chase Manhattan Bank, N.A.*, No. C-93-1483, 1992 U.S. Dist. Lexis 19986, *4-7 (N.D. Cal., June 30, 1992).

In *Villareal*, for example, plaintiffs' complaint expressly stated that the claimed damages did not exceed $50,000, yet the defendant Chrysler contended that punitive damages should be aggregated as a "common and undivided interest" of the plaintiffs to meet the amount in controversy requirement. The court, however, held that the claims of each of the plaintiffs derived from an allegedly defective component in an individual vehicle and that therefore aggregation of the punitive damages was not warranted. *Villareal*, 1996 WL at *3. Although recognizing that the Ninth Circuit has not addressed whether punitive damages may as aggregated for the purpose of determining the amount in controversy, the court followed the holdings in *Harris* and *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. 1156, 1162-64 (C.D.Cal. 1993). In doing so, the *Villareal* court also noted that Chrysler had "unsuccessfully raised the same arguments regarding the aggregation of punitive damages in prior cases. The state of the law on this issue is becoming clearer and may be a factor for awarding fees in any subsequent removals by defendant."

Villareal, 1996 WL at *3 and n.5. Such is clearly the case in the instant action.

The court also takes note of the holding in *Borgeson*, in which the defendant asserted that punitive damages constituted a "common and undivided" interest shared by all the members of the class, and therefore should be aggregated to establish the necessary amount in controversy. The plaintiffs in *Borgeson*, however, sought treble damages under the Cartwright Act, Cal. Bus. & Prof. Code § 16750 *et seq.*, which gives a private right to sue for damages and treble damages to each person who suffers harm. *Borgeson*, 909 F. Supp. at 717. Although the court distinguished an award of treble damages under the Cartwright Act from the recovery of punitive damages, it nonetheless held that "even if the Court were to analogize treble damages to punitive damages, the Court still concludes that treble damages cannot be aggregated for the purposes of the amount in controversy requirement." *Borgeson*, 909 F. Supp. at 719. In so holding the court noted that "[t]he plain language of the Cartwright Act demonstrates that the California legislature intended to vindicate individual rights through private causes of action." *Id.* at 717.

As in *Borgeson*, the court must characterize the claim under the law in the state that creates the cause of action in order to determine whether the claims may be aggregated. The CLRA specifically allows an individual "consumer" who suffers injury as defined by the Act to vindicate his individual rights by bringing an action to recover actual and punitive damages as well as restitution of property. Cal. Civ. Code § 1780. Among the unfair and deceptive acts proscribed by the CLRA is "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." Cal. Civ. Code § 1770(7). The CLRA provision relating to class actions allows any consumer entitled to bring an action under section 1780 to bring an action on behalf of himself and other

consumers, if the other consumers similarly situated have been injured by the alleged unlawful act or practice. Cal. Civ. Code § 1781(a). Chrysler points to nothing in the text of the CLRA or to any case law which indicates that the court should depart from the anti-aggregation rule. Plaintiffs' claims under the CLRA clearly arise from separate and distinct claims regarding the defective paint on Chrysler's vehicles, and each individual plaintiff could sue for punitive damages independently. Furthermore, plaintiffs have not even sought punitive damages at this stage of the litigation, and Chrysler has provided the court with no facts to establish that an award of punitive damages, even if sought, would be sufficient to meet the amount in controversy. As such, the court finds that the aggregation of punitive damages under the CLRA would not be warranted, even if sought.

C. *Aggregation of Attorney's Fees*

As in its previous removal action, Chrysler again claims that attorneys' fees sought must be aggregated and attributed to the named plaintiffs. Unlike the prior removal action, plaintiffs now seek to recover attorneys' fees under California Code of Civil Procedure section 1021.5. Section 1021.5 provides that upon motion:

> a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Cal. Code Civ. Proc. § 1021.5.

Chrysler specifically maintains that the policy underlying section 1021.5 to reward a plaintiff for undertaking the burden and expense of prosecuting an action on behalf of a large class of persons or in the public interest dictates that an award of attorneys' fees under section 1021.5 should be attributed entirely to the named plaintiff. *See Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.*, 60 Cal. App. 4th 1109, 1127 (1997) ("Section 1021.5 is intended as a 'bounty' for pursuing public interest litigation"). The court must therefore determine whether an award of attorneys' fees under section 1021.3 requires a deviation from the long-held rule in the Ninth Circuit prohibiting the aggregation of attorneys' fees to satisfy the amount in controversy requirement. *See* July 20 order, at 7 (citing *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982). The court holds that it does not.

In support of their argument, defendants assert that the Fifth Circuit's decision in *Abbott*, allowing the aggregation of attorneys' fees and attributing it entirely to the named plaintiffs, compels the conclusion that attorneys' fees under section 1021.5 must be attributed solely to the named plaintiffs. *See Abbott*, 51 F.3d at 526-27. In *Abbott*, the Fifth Circuit held that under Louisiana law class representatives were entitled to attorneys' fees, and thus, all the fees recovered were attributable to the named plaintiffs. *Id.* In reaching this decision, the court specifically rejected the determination in *Goldberg* "that attributing a class's attorney's fees only to the named plaintiffs instead of *pro rata* to each member of the class 'would conflict with the policy of *Zahn*.'" *Id.* (quoting *Goldberg*, 51 F.3d at 526). California district courts, however, have rejected similar arguments based on *Abbott* that the amount in controversy requirement may be satisfied by attributing all the attorneys' fees to the named plaintiffs. *Borgeson*, 909 F. Supp. at 717 n.13; *Villareal*, 1996 WL at *3 (attorneys' fees must be pro rated to each class member rather than attributed to the named plaintiff only).

The purpose of an award of attorney fees pursuant to section 1021.5 is to encourage suits that enforce common interests of significant societal importance, but which do not involve any individual's financial interest to the extent necessary to encourage private litigation to enforce the right. To encourage such suits, attorney fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action. Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest.

Satrap v. Pacific Gas & Elec. Co., 42 Cal. App. 4th 72, 78 (1996) (internal citations omitted). In *Beasley v. Wells Fargo Bank, N.A.*, 235 Cal. App. 3d 1407, 1413 (1991), the court considered the defendant's argument that "in class action litigation that yields a common fund recovery, attorney fees should not be awarded under section 1021.5 because they may be paid from the common fund," so that there is not the usual financial burden of private enforcement. The court, however, allowed for attorneys' fees to be recovered in class action litigation:

> If the estimated value of a class action common fund recovery, determined as of the time the vital litigation decisions were being made, does not exceed actual litigation costs by a substantial margin, the financial burden of private enforcement is such as to make it appropriate to award attorney fees under section 1021.5.

Id. at 1415. Nonetheless, the simple fact that a class action involves a sizable number of putative class members does not by itself allow for the recovery of attorneys' fees under section 1021.5. *See Jutkowitz v. Bourns, Inc.*, 118 Cal. App. 3d 102, 112 (1981) (failed to perceive the vindication of the pecuniary interests of the minority stockholders as affecting the public). Despite Chrysler's characterization of attorneys' fees recovered

under section 1021.5 as a "bounty," nothing in the language of section 1021.5 or subsequent California case law requires a departure from the rule of the Ninth Circuit that attorneys' fees must be attributed to each member on a *pro rata* basis and cannot be aggregated for jurisdictional purposes. As in the prior removal action, Chrysler does not attempt to establish that each plaintiff's damages, including attorneys' fees, exceed $75,000.

In conclusion, "[i]f . . . [plaintiff] does not desire to try his case in the Federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). Because Chrysler has failed to meet its burden to establish that has an amount in controversy in excess of $75,000, the court must remand this action to state court.

II. Jurisdictional Discovery

The court briefly addresses Chrysler's motion for leave to conduct jurisdictional discovery in light of its argument that the court should not remand this action until some jurisdictional discovery is completed. In its motion, Chrysler recounts the long saga of its attempts to secure information from plaintiffs regarding the amount in controversy and attaches its several requests for admission and interrogatories. *See* Def. Mot., Ex. C. The interrogatories and requests for admission all seek affirmative statements from plaintiffs that they do not intend to seek punitive damages and will refuse to recover any amount of damages in excess of $75,000.

Three prior decisions stand out in the court's consideration of Chrysler's motion. Foremost among these decisions, this court has already denied a nearly identical motion for leave to conduct jurisdictional discovery in the first removal action noticed by Chrysler, stating that "a motion to remand going to the very jurisdiction of the court shall be heard before any other

motions." *See Gibson,* C-98-1462 MHP, slip op. (N.D.Cal., May 26, 1998). The Ninth Circuit denied Chrysler review of this order for "lack of jurisdiction." Second, the state court summarily denied Chrysler's motion to compel plaintiffs to answer nearly identical interrogatories and requests for admission after this court remanded plaintiffs' various actions to state court. From the representations and submissions of the parties, it is clear that the state court was fully apprised of Chrysler's jurisdictional concerns and heard extensive argument on these concerns. Finally, the district court in *Fein v. Chrysler Corp.*, CV-98-4113 (CPS), slip op. [Saveri Decl., Ex. 17] at 20-23 (E.D.N.Y., September 28, 1998), the court considered a nearly identical discovery request by Chrysler in a case in a procedural posture similar to the one at bar. Particularly relevant is the court's determination that

> As for defendant's request that plaintiffs now waive any right to recover more than $75,000, any post-removal stipulation does not affect the outcome of this motion. The amount in controversy is determined by examining the situation at the time of removal.

Id. at 22-23 (citations omitted). Chrysler's contention that the decision of the *Fein* court does not bear on the issues before this court is beside the point.

Chrysler further points to *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373 (9th Cir. 1997), in support of its argument that this court has the "duty" to order jurisdictional discovery.[4] In *Singer,* the Ninth Circuit considered in a removal action the question of what constitutes compliance with the amount in controversy requirement where California

---

[4]Chrysler also cites to numerous Ninth Circuit cases in which courts have allowed discovery in order to ascertain the court's subject matter jurisdiction, but few of these have done so in the context of removal actions. *See Sharp Elec. Corp. v. Copy Plus, Inc.*, 939 F.2d 513, 515 (7th Cir. 1991).

law prohibits the setting out a monetary *ad dammum* in the complaint. *See* Cal. Code Civ. Proc. § 425.10(b) (prohibiting plaintiff from setting out a monetary *ad dammum* in actions to recover actual or punitive damages for personal injury or wrongful death). The court acknowledged the Fifth Circuit's procedure for determining the amount in controversy on removal where the amount in controversy is not "facially apparent" from the complaint, the court may consider facts in the removal petition and may "require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal." *Singer*, 116 F.3d at 376 (quoting *Allen*, 63 F.3d at 1335-36). The *Singer* court, however, did not apply this procedure. Rather, it held that the district court's decision to accept, in the reasonable exercise of its discretion, a formal judicial admission made in open court by the plaintiff's attorney that the amount in controversy exceeded $50,000 was sufficient to defeat plaintiff's choice of forum and confer diversity jurisdiction to the district court.[5] *Id.* at 376 (noting that district court judge has discretion to accept admission as establishing the amount in controversy in *ad dammum* cases). In closing, the court noted that "[t]he plaintiff, after all, creates the controversy and is the master of the claim, and decides how much money to spend." *Id.* (citing 14A Wright, Miller & Cooper § 3702, at 22).

Unlike the facts in *Singer*, the Complaint makes clear that "plaintiffs and each class members' individual claim will be worth on average less than $30,000, inclusive of attorneys' fees and damages." Compl., ¶ 10. The situation presented here is more akin to that found in *Gaus*, 980 F.2d at 567, where the defendant offered "no facts whatsoever" to show that the amount in controversy exceeded $50,000 and the court held

---

[5]*Singer* was filed before Congress amended 28 U.S.C. § 1332(a) to raise the amount in controversy requirement from $50,000 to more than $75,000. *See Singer*, 116 F.3d at 375 n.1.

that defendant had failed to meet its burden on removal of establishing that the amount in controversy is satisfied. Chrysler has provided the court with nothing but speculation that the amount in controversy satisfies the statutory minimum, and as such Chrysler's motion for leave to conduct jurisdictional discovery must be denied.

III. Attorneys' Fees

Plaintiffs seek attorneys' fees and costs associated with their motion to remand to state court pursuant to 28 U.S.C. section 1447(c). Section 1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U .S.C. § 1447(c). A district court may therefore impose against a party who unsuccessfully removes a case to federal court a reasonable attorneys' fee as part of the costs and expenses incurred by an opposing party without having to find that the removing party acted in bad faith. *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). Moreover, the court has wide discretion in determining whether to award attorneys' fees under section 1447(c). *Id.; see also Navarro-Rice v. First USA Bank*, 984 F. Supp. 1312, 1316 (D.Ore. 1997).

As noted above, Judge Fern M. Smith has held an award of attorneys' fees against Chrysler may be proper in light of further clarifications in the law regarding the aggregation of punitive damages. *See Villareal*, 1996 WL at *3 and n.5. Such a time has come: with the exception of its arguments based on Code of Civil Procedure section 1021.5 and the CLRA, Chrysler has raised no new substantial arguments in this removal action, nor has it pointed to any significant change in facts. In fact, it has asserted arguments which are tenuous at best and has clearly discovered insufficient information through its jurisdictional discovery in state court to warrant a second removal action. As this court has noted, "[u]sing discovery methods to ascertain whether jurisdictional requirements are

met rather than immediately removing the case to federal court before being certain that all necessary proof is available promotes judicial efficiency and economy by preventing removal that is likely to be remanded and possibly by preventing removal altogether if it becomes clear that the jurisdictional requirements are not present." *Kirkland v. Morton's of Chicago,* 1996 WL 532118, *4 (N.D.Cal., September 16, 1996).

Because this court has determined that removal of this case was improper, the court awards attorneys' fees and costs expended by plaintiffs in addressing the issues raised by Chrysler's removal of these actions from state court.

IV. Sanctions

Plaintiffs ask the court to impose Rule 11 sanctions upon Chrysler for re-removing this action to federal court, and in doing so, asserting arguments frivolous or already rejected by the courts. The court has already described the lengthy history of this action, the efforts of Chrysler originally to remove this action and to obtain jurisdictional discovery, and this court's prior decision. The court now discusses issues related specifically to determining whether an award of sanctions is proper under the circumstances.

First, Chrysler has been forewarned of the shaky ground upon which this and prior removal actions have been based in these paint cases. Most importantly, this court has contemplated the propriety of imposing sanctions upon Chrysler for improper removal:

> In fact, I think sanctions might be appropriate because this isn't the first time, apparently, you have been warned not to do this, and it's a waste of time and a waste of money, and somehow I think you were hoping to bypass the the [*sic*] whole jurisdictional issue because I saw what you were going to and jumping right to the MDL. You can't do that.

Herzog Decl., Ex. C at 18-19. Furthermore, in remanding the prior removal action to state court, this court directed Chrysler to "go back to State Court and you take your discovery and you come back here again . . . but I don't think you will be able to establish [the amount in controversy]." *See* Herzog Decl., Ex. C at 17. The court in closing stated "don't come back with another one of these [removal actions] that doesn't have a basis on the papers for federal diversity jurisdiction." *Id.* at 20. The court has not been alone in issuing these warnings to Chrysler. *See Villareal,* 1996 WL at *3 and n.5.

Second, Chrysler was not able to "firmly establish[ ]" that the amount in controversy requirement was satisfied from the discovery sought in state court, but nonetheless, persisted in removing this action to federal court simply based on its "information." *See* Note of Removal, ¶ 16. Moreover, as discussed above, the state court in a telephone conference denied Chrysler's motion to compel responses to its set of admissions and interrogatories. Saveri Decl., at Ex. 18. Despite this court's warning that it did not believe Chrysler would not be able to acquire the discovery it needed and this court's previous denial of Chrysler's motion for jurisdictional discovery, Chrysler both removed this action and filed a motion for jurisdictional discovery. As such, this action was removed from state court with little factual foundation.

Finally, in reviewing the arguments presented by Chrysler in its notice for removal and in response to plaintiffs' motion to remand, this court finds that Chrysler in large part raised arguments that were clearly frivolous in light of this court's July 20 order and the decisions of other courts in the Ninth Circuit. In particular, the court finds that Chrysler's arguments in connection with disorgement and rescission, punitive damages, and supplemental jurisdiction have been squarely addressed by the court's July 20 order. At best, Chrysler's argument that attorneys' fees under section 1021.5 should be attributed to the named plaintiffs had a colorable, though not

entirely plausible, basis. As such, the court finds that Chrysler's arguments are frivolous and that sanctions pursuant to Rule 11 are appropriate.

Rule 11 explicitly limits a district court's sanction to what is sufficient to deter subsequent violations of the rule. Fed. R. Civ. P. 11(c)(2). Neither party in this removal action has been particularly forthright in addressing the jurisdictional issues posed by plaintiffs' complaint. During oral argument on the motions before the court, it became clear that plaintiffs have been less than forthcoming in responding to the various jurisdictional discovery requests made by Chrysler in state court. The lack of comity on plaintiffs' part, however, was in part due to Chrysler's failure to propound good faith interrogatories designed to determine the extent of damages suffered by plaintiffs and the factual and legal bases for the damages sought. Rather, Chrysler used the discovery process to obtain what amounts to a stipulation by plaintiffs that they will not seek individual damages of greater than $75,000 per plaintiff. The sanctions imposed upon Chrysler must be tailored to not only account for Chrysler's failure to advance non-frivolous arguments in removing these actions to federal court, but also to reflect what this court finds to be plaintiffs' insistence on treating Chrysler's jurisdictional concerns in a manner not entirely candid and with frankness. The court concludes that a saction be imposed on Chrysler in an amount sufficient to "reimburse" the court for the time spent by its law clerk in addressing Chrysler's arguments for the second time. Billing at a rate of $100 per hour and for the 15 hours spent on these motions and related issues, the court sanctions Chrysler in the amount of $1500 payable to the Clerk of Court.

CONCLUSION

For the foregoing reasons, the court hereby REMANDS this action to the state courts. The court further GRANTS plaintiffs' motion for attorneys' fees and sanctions and DENIES defendant Chrysler's motion for leave to conduct

jurisdictional discovery. Chrysler is directed to pay to the Clerk of the Court the amount of $1500 within ten (10) days or the date of this order. Plaintiffs are also ordered to submit within thirty (30) days of the date of this order an accounting of attorneys' fees and costs expended in prosecuting the instant motion to remand and for sanctions and attorneys' fees and in opposing Chrysler's motion for jurisdictional discovery. Chrysler shall file its response, if any, within thirty (30) days of the filing of the accounting at which time the matter will be deemed submitted. Chrysler's response shall be limited to the reasonableness of the costs and fees and shall *not* take up again the merits of an attorneys' fees award.

The Clerk of the Court shall transmit forthwith certified copies of this order to:

(1) the Clerk of the Superior Court for the County of San Francisco for *Gibson v. Chrysler Corp.*, C-99-1047 MHP;

(2) the Clerk of the Superior Court for the County of San Francisco for *DePalma v. Chrysler Corp.*, C-99-1048 MHP; and,

(3) the Clerk of the Superior Court for the County of Alameda for *Maldonado v. Chrysler Corp.*, C-99-1049 MHP.

Finally, because the court remands this action to state court, it DENIES as moot defendant Chrysler's motion for substitution of name. This order fully adjudicates the motions reflected at Docket # 10, # 11, # 19, and # 20 and the Clerk of the Court shall remove them from the pending motions list.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRYSLER CORPORATION,	)	
	)	
Petitioner,	)	No. 98-70890
vs.	)	
	)	DC# CV-98-1462-MHP
UNITED STATES DISTRICT	)	CV-98-1501-MHP
COURT FOR THE	)	CV-981502-MHP
NORTHERN DISTRICT	)	Northern California
OF CALIFORNIA,	)	
	)	
Respondent,	)	ORDER
	)	
URSULA GIBSON; et al.,	)	Filed Aug. 20, 1998
	)	
Real Parties in Interest.	)	
	)	

Before: O'SCANNLAIN, RYMER and HAWKINS, Circuit Judges

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT CALIFORNIA.

Ursula GIBSON and Mary Depina, individually, and on behalf of all others

similarly situated, Plaintiffs,

v.

CHRYSLER CORPORATION, and Does 1 through 500, inclusive, Defendants.

No. C-98-1462 MHP.

July 20, 1998.

R. Alexander Saveri, Saveri & Saveri, San Francisco, CA, for Ursula Gibson, Plaintiff.

R. Alexander Saveri, (See above), for Mary Depina, Plaintiff.

Kurt B. Opsahl, Severson & Werson, San Francisco, CA, for Chrysler Corporation, defendant.

MEMORANDUM AND ORDER

PATEL, Chief J.

Plaintiffs[1] Ursula Gibson and Mary DePina originally brought a class action in the Superior Court for the County of San Francisco against defendant Chrysler Corporation ("Chrysler") and others alleging (i) breach of express warranty under California Commercial Code section 2313; (ii) violation of the California Song-Beverly Consumer Warranty Act ("Song-Beverly Act") and willful breach of express warranty under California Civil Code section 1794; and (iii) unfair and fraudulent business practices under California Business and Professions Code section 17200, *et seq.* ("Unfair Competition Act"). Plaintiffs' claims are based on alleged paint defects discovered in Chrysler vehicles after several years of ownership. Chrysler removed the action to this court based on federal diversity jurisdiction.

Now before the court is plaintiffs' motion to remand to state court and for attorneys' fees and costs. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

On March 6, 1998 plaintiffs filed a class action complaint in California Superior Court for the County of San Francisco

---

[1]On March 27, 1998, Stephen DePalma filed a complaint in the Superior Court for the County of San Francisco, and on April 1, 1998, Paul Maldonado filed a complaint identical to DePalma's in the Superior Court for the County of Alameda. These actions, along with the class action filed by Gibson and DePina in the Superior Court for the County of San Francisco, were later removed by Chrysler to federal court: *Gibson v. Chrysler Corp.*, C-98-1462 MHP; *DePalma v. Chrysler Corp.*, C-98-1501 MHP; *Maldonado v. Chrysler Corp.*, C-98-1502 MHP. All the actions were found to be related, and together, were assigned to this court.

alleging that Chrysler vehicles that they purchased or leased between 1986 and 1997 have a latent paint defect. According to the plaintiffs, these defects resulted in delamination of the paint and deterioration of the appearance and protective finish after only a few years of ownership.[2] Plaintiffs also allege that Chrysler knew or should have known of the problem, but did not warn purchasers of the defect or offer to compensate owners of vehicles with the defect. Plaintiffs seek compensatory and punitive damages, restitution of all amounts paid by plaintiffs and class members, and/or disgorgement of Chrysler's profits, as well as equitable relief and attorneys' fees. The complaint finally states that damages for each named plaintiff and member of the putative class will not exceed $75,000.

Chrysler removed the action to federal court on the basis of diversity of citizenship under 28 U.S.C. section 1332(a). Plaintiffs filed a motion to remand this action to state court on May 5, 1998.

LEGAL STANDARD

As a general rule, an action is removable to a federal court only if it might have been brought there originally. 28 U.S.C. § 1441(a). The removal statute is strictly construed, and the court must reject federal jurisdiction if there is any doubt as to whether removal is proper. *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996). The defendants bear the burden of proving the propriety of removal. *Id.* Where the jurisdiction of

---

[2]Plaintiffs allege that in 1985, Chrysler changed the painting process used on its vehicles to one that involved two steps (using an undercoat called "Uniprime"), instead of the three-step process previously used. This change was instituted by Chrysler to enhance corrosion resistance, reduce costs, and comply with environmental regulations. Plaintiffs allege that the "Uniprime" undercoat oxidizes when exposed to ultraviolet light, which weakens its bond with the exterior paint, causing peeling of the paint.

the court is challenged, the party invoking federal jurisdiction bears the burden of demonstrating that its jurisdictional allegations are supported by competent proof. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). If at any time before final judgment the court determines that it is without subject matter jurisdiction, the action shall be remanded to state court. 28 U.S.C. § 1447(c).

DISCUSSION

Federal diversity jurisdiction requires both complete diversity of the parties and an amount in controversy exceeding $75,000.[3] 28 U.S.C. § 1332(a). No dispute exists as to the diversity of the parties. Plaintiffs maintain that this court does not have diversity jurisdiction over this action because the complaint clearly states that each plaintiff's damages will not exceed $75,000. Chrysler contends that the amount in controversy requirement is met because the damages sought are a common and undivided interest that may be aggregated. Chrysler also contends that the court has supplemental jurisdiction over all class members because one or more of the named plaintiffs may receive more than the jurisdictional minimum.[4] Plaintiffs respond that punitive damages are not a common and undivided interest, and that the damages of class members may not be aggregated.

---

[3]The diversity of the parties is not in dispute. Plaintiffs are citizens of California and Chrysler is a citizen of Delaware, its state of incorporation, and Michigan, its principal place of business.

[4]Chrysler raises the issue of this court's supplemental jurisdiction in its notice of removal, but does not pursue this line of argument in its opposition to plaintiffs' motion to remand. To support supplemental jurisdiction, Chrysler would have to show that one or more of the named plaintiffs has a claim in excess of $75,000. Chrysler does not assert any facts establishing that any plaintiff's individual claim exceeds $75,000.

I. Actual Damages

In class actions, the removing party must prove that each plaintiff and every class member has an amount in controversy in excess of $75,000. *Snyder v. Harris*, 394 U.S. 332, 338, (1969); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 (1973). When determining whether the damages pled by the plaintiffs satisfy the amount in controversy requirement for diversity jurisdiction, the damages asserted in the complaint must be accepted as true if claimed in good faith. 28 U.S.C. § 1332(a). The complaint states that individual damages will not exceed $75,000. The plaintiffs' motion for remand states that actual damages will be approximately $5,000, the cost of repainting a vehicle, in addition to punitive damages, attorneys' fees, and equitable relief. Chrysler does not claim that the damages were requested in bad faith, nor does it allege any facts that challenge the plaintiff's assertion that individual damages do not exceed $75,000. Conclusory allegations, unsupported by facts, are insufficient to support an assertion in the removal notice that the amount in controversy exceeds $75,000. *Gaus*, 980 F.2d at 567.

As a general rule, the separate and distinct claims of class action plaintiffs cannot be aggregated to reach the $75,000 jurisdictional requirement. *Snyder*, 394 U.S. at 336-37. Aggregation is permissible, however, when "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Id.* at 335. The Ninth Circuit has held that claims are only common and undivided if they derive from rights that plaintiffs hold in group status, or they relate to a single *res* such as an estate or an insurance policy. *Eagle v. AT&T Co.*, 769 F. 2d 541, 546 (9th Cir. 1985); *Potrero Hill Community Action Comm. v. Hous. Auth. of the City and County of San Francisco*, 410 F.2d 974, 978 (9th Cir. 1969). Chrysler does not offer any facts that suggest the actual damages sought are common and indivisible. Therefore, the

actual damages may not be aggregated to meet the amount in controversy requirement.

II. Punitive Damages

Chrysler argues that the punitive damages claimed by the plaintiffs are a common and undivided interest that should not be subject to the anti- aggregation rule. Chrysler also claims that the equitable relief requested is a common and undivided interest because it would benefit the class as a whole, and not any one individual.[5]

Initially, the court notes that the sections of the California Code on which the plaintiffs' claims are based do not permit recovery of punitive damages. Plaintiffs' claims include breach of express warranty under the California Commercial Code section 2313, a violation of the Song-Beverly Act, and a violation of the Unfair Competition Act. California Commercial Code remedies include "the right to reject nonconforming goods, to revoke acceptance, to cover by purchasing substitute goods, and to recover damages for breach of warranty." *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 212, 285 Cal. Rptr. 717 (1991). Punitive damages are not available under the Commercial Code. *Id.* at 212, 285 Cal. Rptr. 717. Similarly, in *Troensegaard v. Silvercrest Industries,* 175 Cal. App. 3d 218, 219, 220 Cal. Rptr. 712 (1985), the California Court of Appeal held that a claim for a civil penalty plus attorneys' fees and costs under section 1794 constitutes a waiver of punitive damages permitted by California Civil Code section 3294. Punitive damages are therefore also not recoverable under the Song- Beverly Act.

---

[5]When plaintiffs' claims are separate and distinct, the Ninth Circuit bars the aggregation of equitable relief for the purposes of establishing the amount in controversy for diversity jurisdiction. *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977).

Finally, plaintiffs' claim for unfair and fraudulent business practices was brought under the Unfair Competition Act. Injunctive and restitutive remedies available under section 17203 are "designed to prevent unfair business practices and to require disgorgement of money or property obtained by means of such practices." *State Farm Fire & Cas. Co. v. Superior Court for the County of Los Angeles*, 45 Cal. App. 4th 1093, 1110, 53 Cal. Rptr. 2d 229 (1996). No compensatory or punitive damages, however, may be recovered under the Unfair Competition Act. *Id.* at 1110, 53 Cal. Rptr. 2d 229. All of the plaintiffs' claims were brought under statutes that do not permit recovery of punitive damages. No punitive damages will be recovered in this action, therefore there can be no aggregation of punitive damages to meet the jurisdictional minimum.

When punitive damages are permitted by statute, however, courts are required to consider potential punitive damages as well as pecuniary damages when determining the amount in controversy. *Bell v. Preferred Life Assur. Soc. of Montgomery*, 320 U.S. 238, 240 (1943). The Ninth Circuit has not directly addressed whether punitive damages constitute a common and undivided interest that may be aggregated to meet the jurisdictional minimum. However, several California district courts have held that punitive damages in a class action claim are subject to the anti-aggregation rule. *Villareal v. Chrysler Corp.*, No. C-95-4414, 1996 U.S. Dist. Lexis 3159,*8-10 (N.D.Cal. March 11, 1996); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 719 (C.D. Cal. 1995); *Harris v. Chase Manhattan Bank, N.A.*, No. C-93-1483, 1992 U.S. Dist. Lexis 19986,*4-7 (N.D. Cal. June 30, 1992).

For example, in *Borgeson*, the court held that treble damages, punitive in nature, could not be aggregated unless the class shares a common and undivided interest. *Borgeson*, 909 F. Supp. at 718. If each plaintiff could pursue a claim individually, the interests are separate and distinct and may not

be aggregated. *Id.* Similarly, in *Villareal*, the court held that each plaintiff's claim was derived from a defect in an individual vehicle, and therefore aggregation of the punitive damages was not warranted. *Villareal*, 1996 U.S. Dist. Lexis, at *7. The court in *Villareal* acknowledged that Ninth Circuit law on the aggregation of punitive damages is not clearly settled. The court also noted, however, that Chrysler had raised the same argument in prior cases, possibly warranting an award of fees and costs to plaintiffs in any subsequent removal actions by Chrysler.[6] *Id.*, at *11.

Plaintiffs seek damages in the form of a "paint correction fund" from which present and future class members will be compensated. Chrysler argues that the court should view the "paint correction fund" in terms of its total value, which would exceed $75,000. The establishment of a fund from which plaintiffs are compensated is a convenient and efficient method of compensation in a class action case. The inquiry into whether plaintiffs' claims are common and undivided is not affected by the fact that plaintiffs are compensated from a fund. *Smiley v. Citibank (S.D.), N.A.*, 863 F. Supp. 1156, 1163 (C.D. Cal. 1993). Although plaintiffs brought a class action claim,

---

[6]In support of its argument, Chrysler relies on a Fifth Circuit decision which holds that punitive damages are a single, collective right in which class members have a common and undivided interest. *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995), *reh'g denied*, 70 F.3d 26 (5th Cir. 1998) (per curiam). This case was subsequently limited to apply to the law of Mississippi only. The order denying a rehearing en banc stated that "the panel is of the unanimous view that the opinion in this case reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state." *Allen*, 70 F.3d at 26. The Eleventh Circuit has also held that punitive damages are fundamentally collective. *See Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996). The court, however, limited its holding to a narrow set of facts and did not attempt to formulate a general rule on aggregation of punitive damages. *Id.* at 1359.

each plaintiff suffered a distinct injury and each plaintiff could individually bring an action against Chrysler. The court finds that plaintiffs' claims are separate and distinct, and the existence of a "paint correction fund" does not transform the plaintiffs' individual rights into jointly-held rights.

The purpose of the amount in controversy requirement for diversity jurisdiction is to limit the number of cases on the federal court docket. As stated in *Snyder* and *Zahn*, if the anti-aggregation rule protecting this purpose did not exist, nearly every class action case would be in federal court. *Snyder*, 394 U .S. at 340; *Zahn*, 414 U.S. at 301. The Supreme Court has clearly articulated a rule against aggregation of separate and distinct claims, and it would be far too easy to establish federal jurisdiction if aggregation of punitive damages were allowed in every class action. *Snyder*, 394 U.S. at 340.

Chrysler fails to establish that plaintiffs' claims are an undivided interest or that any individual claim exceeds $75,000. The court therefore finds that the claims of the plaintiffs are separate and distinct and may not be aggregated to meet the minimum for diversity jurisdiction.

III. Aggregation of Attorneys' Fees

Chrysler claims that attorneys' fees may be aggregated to meet the amount in controversy requirement in class actions. The Ninth Circuit has not allowed the aggregation of attorneys' fees to satisfy the jurisdictional minimum. *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982). Each plaintiff's pro rata share of attorneys' fees may be counted toward individual damages. Chrysler does not attempt to establish that each plaintiff's damages, including attorneys' fees, exceed $75,000. Chrysler admits that attorneys' fees may not be treated as a common fund for the purposes of establishing the jurisdictional minimum, but urges the court to reconsider this "antiquated" rule in light of the realities of modern day class action litigation. The court sees no reason to

reconsider the law on aggregation of attorneys' fees at this time.

CONCLUSION

For the foregoing reasons, the court hereby REMANDS this action. The Clerk of the Court shall transmit forthwith certified copies of this order to:

(1) the Clerk of the Superior Court for the County of San Francisco in the matter of *Gibson v. Chrysler Corp.*, C-98-1462 MHP.

(2) the Clerk of the Superior Court for the County of San Francisco in the matter of *DePalma v. Chrysler Corp.*, C-98-1501 MHP.

(3) the Clerk of the Superior Court for the County of Alameda in the matter of *Maldonado v. Chrysler Corp.*, C-98-1502 MHP.

This order fully adjudicates the motion reflected at Docket # 9-1 and the Clerk of the Court shall remove it from the pending motions list.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

(2)

No. 01-688

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

URSULA GIBSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300

JOHN H. BEISNER
(*Counsel of Record*)
JONATHAN D. HACKER
RAJESH DE*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Admitted in New Jersey only*

Attorneys for Amicus Curiae

21pp

QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes a federal district court to take supplemental jurisdiction over the claims of unnamed members of a class, where prior to class certification the named plaintiffs seek punitive damages in excess of the minimum amount necessary for the court to assume original jurisdiction over the named plaintiffs' claims.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 2

INTRODUCTION 2

REASONS FOR GRANTING THE WRIT 3

I. REVIEW SHOULD BE GRANTED TO SETTLE A CONTROVERSY THAT HAS PREVENTED FEDERAL COURTS FROM ASSUMING JURISDICTION OVER CASES THAT OUGHT TO BE HEARD IN THE COURTS OF THE NATION 4

II. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CLASS ACTIONS CAN BE REMOVED WHERE THE NAMED PLAINTIFFS SEEK PUNITIVE DAMAGES IN EXCESS OF $75,000 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Avery v. State Farm Mut. Auto Ins. Co.,
746 N.E.2d 1242 (Ill. Ct. App. 2001) 8

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 12

City of Chicago v. Int'l College of Surgeons,
522 U.S. 156 (1997) 11

Davies v. Corbin,
112 U.S. 36 (1884) 13

Free v. Abbot Labs., Inc.,
529 U.S. 333 (2000) 2, 3, 11

Guaranty Trust Co. v. New York,
326 U.S. 99 (1945) 10

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 10

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 6

Shields v. Thomas,
58 U.S. (17 How.) 3 (1855) 13

TXO Prod. Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) 10

Wisconsin Dep't of Corr. v. Schact,
524 U.S. 381 (1998) 12

Zahn v. Int'l Paper Co.,
414 U.S. 291 (1973) 11

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES

28 U.S.C. § 1332 ..... 3, 10

28 U.S.C. § 1367 ..... *passim*

OTHER AUTHORITIES

John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, Manhattan Institute Civil Justice Report 3 (Sept. 2001) 4, 5, 9

Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees, Hearing before the Subcomm. on Administrative Oversight and the Court of the Senate Judiciary Comm., 104th Cong. (1997) (statement of Sen. Herb Kohl) 7

Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 Emory L.J. 1305 (2000) 5

Exec. Summary, RAND Institute for Civil Justice, *Class Action Dilemmas* (1999) 5, 6, 8

Federalist Society, *Analysis: Additional Findings*, I Class Action Watch 3 (Fall 1999) 5

TABLE OF AUTHORITIES
(Continued)

Page(s)

Federalist Society, *Analysis: Class Action Litigation*, I Class Action Watch 2 (Spring 1999) 7

Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary on H.R. 3789, 105th Cong. (1998) (testimony of Sheila Birnbaum, Esq.) 6

Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary on H.R. 3789, 105th Cong. (attached testimony of John W. Martin, Jr.) 6

D. Hensler, *Preliminary Report of the RAND Study of Class Action Litigation* (May 1, 1997) 7

H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary (1999) (statement of Hon. Walter E. Dellinger), *available at* http://www.house.gov/judiciary/dell0721.htm 8

Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judiciary, 105th Cong. (1998) (statement of Dr. John Hendricks) 6

TABLE OF AUTHORITIES
(Continued)

Page(s)

S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm., 106th Cong. (1999) (statements of Sen. Herb Kohl & John P. Frank) 7

Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times, Sept. 27, 1998 9

IN THE

Supreme Court of the United States

No. 01-688

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

URSULA GIBSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of petitioner, with the written consent of the parties.[1]

[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council ("PLAC") is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 525 briefs as amicus curiae in both state and federal courts, including a brief filed in support of respondents in *Free v. Abbot Laboratories, Inc.*, 529 U.S. 333 (2000), which presented the same question that is at the heart of this case. PLAC's filing in *Free* reflects its members' particular interest in the rules governing the removal to federal court of putative class actions filed in state courts. PLAC's members have observed the marked increase in state-court class actions over recent years, and many have first-hand experience with the varied practices of numerous state courts with respect to class certification. For these reasons, PLAC and its members have a very real and concrete interest in the resolution of the questions presented by the petition in this case.

INTRODUCTION

The petition for a writ of certiorari raises a set of interrelated questions of federal jurisdiction, questions with significant consequences for class action litigation and punitive damages claims in both federal and state courts. One aspect of the decision below would make it easier for federal courts to assume jurisdiction over the kinds of nationwide class actions that, we submit, *ought* to be in federal and not state court. Yet by offering plaintiffs an apparently easy end run around the court's holding, the decision below simply closes

one important one loophole to the assertion of federal jurisdiction, while opening yet another.

This Court should grant the writ and close both loopholes for once and for all. The loopholes are, after all, entirely court-made; the applicable jurisdictional statutes are clear and unambiguous. What may be less clear are the consequences of obstacles to federal court jurisdiction like the no-punitive-damage-aggregation rule adopted by the court below, and like the even more sweeping no-supplemental-jurisdiction rule adopted by several other circuits. The problem, as members of amicus PLAC can attest, is that certain state court systems have failed to respond with adequate regard for the rights of those haled into court in the new era of mass litigation. That failure that has resulted in the establishment of a few local courts as the forums of first resort for a great many class actions involving issues and problems of nationwide import. Proper resolution of the controversies implicated by the decision below is urgently needed to clear away a key decisional barrier to federal court jurisdiction in cases of truly national significance.

REASONS FOR GRANTING THE WRIT

As the petition persuasively demonstrates, the plain terms of the supplemental jurisdiction statute, 28 U.S.C. § 1367, require a federal district court to assume jurisdiction over a class action that includes claims that do not satisfy the minimum amount in controversy requirement of the diversity statute, 28 U.S.C. § 1332, so long as the action includes at least one plaintiff with monetarily sufficient claims (and citizenship diversity requirements are met). Amicus PLAC filed a brief in *Free v. Abbot Laboratories, Inc.*, 529 U.S. 333 (2000), making the same argument.

In the time since the Court in *Free* sought unsuccessfully to resolve the § 1367 interpretive question at the heart of this case, the conflict in the courts has only deepened, uncertainty has only intensified, and wasteful jurisdictional litigation has

only proliferated. Meanwhile, the dockets of certain state courts have continued to swell with nationwide class actions that those courts have proved unable or unwilling to manage appropriately – actions that in many cases would be removed to federal court if the plain language of § 1367 were the governing rule, as it should be. Final resolution of this controversy is long overdue. The Court should take the opportunity this case presents to correct the error of several circuits in refusing to follow the plain language of § 1367, and the failure of the court below to apply that plain language to punitive damages claims.

I. REVIEW SHOULD BE GRANTED TO SETTLE A CONTROVERSY THAT HAS PREVENTED FEDERAL COURTS FROM ASSUMING JURISDICTION OVER CASES THAT OUGHT TO BE HEARD IN THE COURTS OF THE NATION

The petition sets forth the circuit conflict over the § 1367 interpretive issue addressed by the decision below, as well as the historical controversy over application of the law in the punitive damages context. Pet. 8-25. We will not rehearse those controversies here. Rather, it is our purpose to set forth the broader context of state-court class-action litigation in which the controversies have arisen, a context that demonstrates the need for this Court to ensure that rules – such as § 1367 – authorizing federal jurisdiction in appropriate cases are strictly followed.

It is an unfortunate reality that not every state – or every state court – has responded equally to the challenges of the modern complex litigation era. While it cannot be said that every local court in every state has proved incapable of handling the procedural fairness difficulties inherent in mass litigation, an identifiable pattern of problems has emerged.

First, there is now a "substantial body of data confirming that certain state courts have become 'magnets' for multistate and nationwide class actions." John H. Beisner & Jes-

sica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, Manhattan Institute Civil Justice Report 3, at 27 (Sept. 2001) ["*Manhattan Institute Report*"]. This problem poses a particular concern for PLAC's members, most of whom sell products in a national market, and thus risk being subjected to suit in virtually any state court that acts hospitably towards class actions. Studies conducted by the Manhattan Institute and the RAND Institute for Civil Justice have confirmed that certain state courts are indeed disproportionately likely to certify nationwide classes than are the federal courts or other state courts, and have thus made themselves favorites of the class action plaintiffs' bar. *See id.* at 7-9; Exec. Summary, RAND Institute for Civil Justice, *Class Action Dilemmas*, at 7 (1999); *see also* Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 Emory L.J. 1305, 1320 (2000) ("many commentators believe that there is indeed a trend toward state-law damages class actions being filed in state courts"). In fact, a recent survey of 100 Fortune 500 companies with nationwide commercial interests revealed that a substantial proportion of class actions were filed in just a few states.[2] The *Manhattan Institute Report* found "an inexplicably large number of class actions" filed in three local courts – Madison County, Illinois; Jefferson County, Alabama; and Palm Beach County, Florida. *Manhattan Institute Report*, *supra*, at 10. And one state court judge certified almost as many cases for class action treatment during 1996-97 as were certified during 1997 by all approximately 900 federal district

---

[2] *See* Federalist Society, *Analysis: Additional Findings*, I Class Action Watch 3, at 3 (Fall 1999). The survey found that 54 percent of the reported class actions appeared in just five jurisdictions – Alabama, California, Louisiana, Ohio, and Texas – in 1993, and that by 1998 the number had jumped to 69 percent.

judges combined.[3] As the RAND report concluded, "class action attorneys 'shop' for judges who are favorable to class actions," and such attorneys "find them most often in state courts." *Class Action Dilemmas*, *supra*, at 7.[4]

Second, it turns out, unsurprisingly, that certain state courts are class action magnets for a reason: they are less likely than other state courts, and much less likely than the federal courts, to ensure that defendants receive fair treatment in mass litigation. Elemental concepts of fairness and due process require that mass litigation devices such as the class action include procedures to ensure each defendant "the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Unfortunately, to many state courts have not taken seriously the duty to ensure class action defendants – often out-of-state corporate defendants – the protections of due process. *See, e.g.*, *H.R. 3789 Subcommittee Hearing*, *supra* note 4, at 22 (attached testimony of John W. Martin, Jr.) ("many local courts are willing to certify for class action treatment cases that do not comport with the basic class action requirements. . . . Indeed, some state courts actually have certified proposed classes identical to ones rejected outright by federal courts [on due process grounds]."). For example, the congressional hearings revealed a pattern among

---

[3] *See Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Dr. John Hendricks), *available at* http://www.house.gov/judiciary/41164.htm.

[4] *See also Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary on H.R. 3789* ["*H.R. 3789 Subcommittee Hearing*"], 105th Cong. 8 (1998) (testimony of Sheila Birnbaum, Esq.) ("Plaintiff class action lawyers will typically seek out 'select' state court judges who quickly certify class actions with seemingly little or no consideration to the appropriateness of class certification under the rules or the due process rights of the defendant and absent class members.").

some state courts of certifying classes on the same day the complaint was filed – *before the defendant was even served with the complaint*. *Id.* Such abuses of the class action device have serious consequences. The issuance of a class certification order immeasurably alters the nature of the litigation, most particularly by dramatically increasing the risks to which the defendant is exposed, and, consequently, the incentives for settling even the most nonmeritorious actions.

Third, the cavalier treatment of such litigation in certain state courts has spawned a more general increase in the amount of complex litigation already burdening society. Class action filings in state courts increased some 1,315 percent over the past decade, as compared to an increase of 340 percent in the federal courts over the same period. Federalist Society, *Analysis: Class Action Litigation*, I Class Action Watch 2, at 3 (Spring 1999). Another commentator has observed a more recent "doubling or tripling of the number of putative class actions," an increase "concentrated in the state courts." D. Hensler, *Preliminary Report of the RAND Study of Class Action Litigation* 15 (May 1, 1997). There is little doubt that many of these class actions would not have been filed in the absence of forums willing to stretch accepted mass litigation procedural protections well past the snapping point.

Fourth, there is a growing body of evidence that many state court class actions impose improper burdens not only on corporate defendants, but also on consumer class members themselves. In recent congressional hearings, witnesses have urged that state court class actions primarily benefit class counsel, not the class members.[5] Those charges

---

[5] *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees, Hearing before the Subcomm. on Administrative Oversight and the Court of the Senate Judiciary Comm.*, 104th Cong. (1997) (statement of Sen. Herb Kohl); *S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and*

are bolstered by case reviews in the RAND study revealing that in non-personal injury class actions filed in state courts, class counsel often (if not typically) receive more dollars from settlements or verdicts than the thousands of persons in the class *combined*. *See Class Action Dilemmas, supra,* at 23.

Fifth, improper state court class actions can have the perverse effect of thwarting the proper application of state law. As former Acting Solicitor General Walter E. Dellinger testified before the House Judiciary Committee,

> many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles. . . . And because the state court decision has binding effect everywhere . . . the other states . . . have no way of revisiting the interpretation of their own laws.[6]

For example, in one recent nationwide class action, a local Illinois court applied Illinois law in a nationwide class action to allow a jury to find an insurance company's practice to be fraud – to the tune of $1.2 billion in punitive damages – despite protestations from other states' insurance officials that the practice condemned by the Illinois court was actively *encouraged* by the laws of their states. *See Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242, 1254 (Ill. Ct. App. 2001). Nevertheless other similarly situated companies immediately stopped the practice, for understandable fear of

---

the Courts of the Senate Judiciary Comm., 106th Cong. (1999) (statements of Sen. Herb Kohl & John P. Frank).

[6] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (1999) (statement of Hon. Walter E. Dellinger) ("Dellinger Testimony"), *available at* http://www.house.gov/judiciary/dell0721.htm.

being hammered by exemplary damages in Illinois courts. Thus a single elected county judge in Illinois was able to "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," essentially establishing "what amounts to a national rule on insurance." Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times, Sept. 27, 1998, § 1, at 29.

Of course, granting the writ in this case will not solve all of the foregoing problems with class action litigation in certain states. But there is no avoiding the fact that the emerging class action litigation crisis has resulted in part from the fact that the doors of the federal courts are often closed to class actions, even those of nationwide consequence. And the old ancillary jurisdiction rule prohibiting consideration of monetarily insufficient class members claims is among the more significant obstacles to federal court jurisdiction over nationwide mass litigation cases. *See Manhattan Institute Report*, *supra*, at 2-3. This case presents the opportunity to inter that rule and open the federal courts to more of the cases that truly ought to be there. If, as we believe, § 1367 would require federal courts to assume jurisdiction in a substantial number of cases in which it is currently denied by many circuits, this Court should grant certiorari and say so now. Continued litigation over this basic jurisdictional question serves no one's interests.

II. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CLASS ACTIONS CAN BE REMOVED WHERE THE NAMED PLAINTIFFS SEEK PUNITIVE DAMAGES IN EXCESS OF $75,000

The general question of how to interpret the supplemental jurisdiction statute, 28 U.S.C. § 1367, arises in this case in the particular context of a putative class seeking punitive damages against a large, out-of-state corporate defendant. The concerns noted in the previous section about fairness to

out-of-state defendants, particularly corporate defendants, are significantly magnified in that context. This Court has previously acknowledged both that there is an inherent risk that a punitive damages award may be "influenced by prejudice against large corporations," and that the risk of such bias is "of special concern when the defendant is a nonresident." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 463 (1993) (plurality op.); *see id.* at 493 (O'Connor, J., dissenting) (for jurors in a punitive damage case, "the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong"). As the Court put the point in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994):

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

It is all the more reason, then, that § 1367 should be interpreted in accordance with its plain meaning in the punitive damages context, *i.e.*, to allow a federal court to assert supplemental jurisdiction over a class action where at least one class member seeks punitive damages exceeding the minimum amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332.[7] The court of appeals in this case

---

[7] It is particularly ironic that the amount-in-controversy requirement of the diversity statute has operated to deny out-of-state defendants access to federal courts in the largest class actions, inasmuch as the very point of the diversity statute since the founding era has been to assure that "non-resident litigants" have access to "courts free from susceptibility to potential local bias." *Guaranty Trust Co. v. New York*, 326 U.S. 99, 111 (1945) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809)).

did hold that the plain meaning of § 1367 governs as general matter, thus abrogating this Court's holding in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that a court may not assert, through Rule 23, ancillary jurisdiction over any monetarily insufficient claims of unnamed class members. For the reasons stated in the petition, and in PLAC's brief in *Free v. Abbott*, that aspect of the court's holding was correct.

But the court nevertheless held that federal jurisdiction was improper here. As to compensatory damages claims, the court held, the claims of unnamed plaintiffs may *not* be considered for purposes of establishing original jurisdiction under § 1367. Pet. App. 20a. As to punitive damages claims, by contrast, the court held that a district court *must* consider the claims of unnamed plaintiffs. *Id.* at 31a. The distinction drawn by the court in the treatment of unnamed class members' compensatory damages, on the one hand, and unnamed class members' punitive damages claims, on the other, is more than merely ironic; it is a misapplication of § 1367 to the punitive damages context.

Section 1367 provides that if the federal court has "original jurisdiction" over any claim in a civil action, the court may assume "supplemental jurisdiction" over all other transactionally related claims in the action. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997). As the court of appeals correctly recognized, a district court merely needs to identify one monetarily sufficient claim over which it can assert original jurisdiction; having done that, the court can then assert supplemental jurisdiction over the claims of all other class members, even if they are monetarily insufficient. Pet. App. 11a. When the five named plaintiffs in this case amended their complaint to seek punitive damages, the amount-in-controversy on *their own claims* at that point well exceeded $75,000. Thus the district court had "original jurisdiction" over those claims, and it should have followed as a matter of course under § 1367 and *City of Chicago* that the

court could assume supplemental jurisdiction over the remaining, unnamed members of the class.[8]

We therefore agree with petitioner that, "to the extent the court felt a need to divide the request among plaintiffs, it should have attributed the punitive damages claims to the named plaintiffs in ascertaining the amount-in-controversy." Pet. 23. No other course is consistent with § 1367. Thus, while we also agree with petitioner that punitive-damages claims are properly treated as "indivisible in nature," *id.*,[9] the

---

[8] It is irrelevant that the inclusion of unnamed plaintiffs' claims, when added by the certification of a class, might retroactively reduce the proportionate allocation of a predicted punitive damages recovery to the named plaintiffs. The propriety of a federal court removal is determined on the basis of the complaint as filed in state court, *Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 390 (1998), and by the court of appeals' own reasoning, under current law only the claims of the named plaintiffs are part of "a class action, when filed." Pet. App. 20a. Thus on the court of appeals' own theory the amount of punitive damages sought by the named plaintiffs cannot be diluted by the claims of plaintiffs not yet before the court.

[9] The court of appeals' error on this point is equally demonstrable. The court held that punitive damages are not a "common and undivided interest" because "the plaintiffs in this case could sue [petitioner] individually on all the causes of action alleged in the current complaint," and "[i]f they did so, nothing would preclude them from seeking and recovering punitive damages individually." Pet. App. 31a. According to the court, the availability of individual punitive-damage suits "directly refutes the argument that there is some unitary res to which the plaintiffs jointly claim a right." *Id.* at 31a-32a. The court is quite wrong: what the possibility of individual suits actually establishes is that each plaintiff's individual claim for punitive damages *exceeds* the jurisdictional minimum. That is so because if each plaintiff sued individually, as the court hypothesizes, he or she would certainly assert a claim for punitive damages claim greater than $75,000. Looking at the claims individually thus confirms (not refutes) the monetary sufficiency of plaintiffs' punitive damages claims. Another way to look at it is to say that any one plaintiff who sued would be seeking whatever amount is deemed necessary to serve society's goals of punishing and deterring the conduct at issue, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996); a class action simply means that several plaintiffs have united to pursue that

class-action/removal/supplemental-jurisdiction issues presented here can be resolved on an even simpler ground. This class action was properly removed because, upon removal, the district court had original jurisdiction over the named plaintiffs' claims for punitive damages, and on that basis could assert supplemental jurisdiction over the unnamed class members' claims pursuant to § 1367.

PLAC urges the Court to grant the writ and clarify that the no-punitive-damage-aggregation rule applied below – if valid at all – does not defeat federal jurisdiction over a punitive damages class where the named plaintiffs' own punitive damages claims, viewed without regard for the existence of unnamed members' claims in a purported but uncertified class, exceed the jurisdictional minimum.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

---

same amount. That amount – i.e., the amount necessary to punish and deter – is the "res" in which all injured plaintiffs have a common interest, whether it is pursued by one, some, or all of them in a given case. *Cf. Davies v. Corbin*, 112 U.S. 36, 41 (1884) (claim to tax is common and undivided where "each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors"); *Shields v. Thomas*, 58 U.S. (17 How.) 3, 4 (1855) (claim is common and undivided where plaintiff seeks "a portion of the common fund to be distributed among the claimants," as opposed to "the amount due to himself on his own separate contract"). And when a punitive damage award *is* pursued jointly, the defendant of course has no stake as to how that award is distributed among the plaintiffs – establishing that the amount in controversy between the parties is the *total amount of punishment*, not any individual plaintiff's *share* in that amount. *See Davies*, 112 U.S. at 40 (claim is common and undivided where it is "perfectly immaterial" to defendant "how it is divided" among plaintiffs); *Shields*, 58 U.S. (17 How.) at 4 (same).

Respectfully submitted,

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 22091
(703) 264-5300

JOHN H. BEISNER
(Counsel of Record)
JONATHAN D. HACKER
RAJESH DE*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Admitted in New Jersey only*

Attorneys for Amicus Curiae

Supreme Court, U.S.
FILED
DEC 10 2001
OFFICE OF THE CLERK

NO. 01-688

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, INC.,
Petitioner,

v.

URSULA GIBSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GUIDO SAVERI
R. ALEXANDER SAVERI
SAVERI & SAVERI, INC.
One Embarcadero Center
Suite 1020
San Francisco, CA 94111
(415) 217-6810

SCOTT L. NELSON
(Counsel of Record)
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondents

December 2001

QUESTIONS PRESENTED

1. Whether, in the absence of a relevant conflict among the lower federal courts, this Court should review the Ninth Circuit's ruling that federal jurisdiction may be exercised over a diversity class action only when at least one named plaintiff satisfies the amount-in-controversy requirement of 28 U.S.C. § 1332.

2. Whether this Court should review the uniform rule in the federal courts of appeals that class members' punitive damages claims may not be aggregated to satisfy the amount-in-controversy requirement.

TABLE OF CONTENTS

INTRODUCTION 1

I. THIS CASE IS A PROCEDURALLY INAPPROPRIATE VEHICLE FOR CONSIDERING WHETHER § 1367 OVERRULES *ZAHN* 1

II. THE COURTS AGREE THAT A NAMED PLAINTIFF IN A DIVERSITY CLASS ACTION MUST SATISFY THE AMOUNT-IN-CONTROVERSY REQUIREMENT 3

III. THERE IS NO REASON TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT PUNITIVE DAMAGES CLAIMS MAY NOT BE AGGREGATED TO SATISFY THE JURISDICTIONAL AMOUNT 5

IV. THIS COURT NEED NOT GRANT REVIEW TO PROVIDE "GUIDANCE" TO THE LOWER COURTS CONCERNING JURISDICTIONAL DISCOVERY 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

In re Abbott Laboratories,
51 F.3d 524 (5th Cir. 1995),
aff'd by an equally divided Court,
529 U.S. 333 (2000) 3-4

Allen v. R&H Oil & Gas Co.,
63 F.3d 1326 (5th Cir. 1995) 5-7

In re Brand Name Prescription Drugs Antitrust Litigation,
123 F.3d 599 (7th Cir. 1997) 4, 7-8

Cohen v. Office Depot, Inc.,
204 F.3d 1069 (11th Cir. 2000) 6

H&D Tire & Automotive-Hardware, Inc. v.
Pitney Bowes Inc., 227 F.3d 326 (5th Cir. 2000),
cert. denied, 122 S. Ct. 214 (2001) 6

Leonhardt v. Western Sugar Co.,
160 F.3d 631 (10th Cir. 1998) 3

Lindsey v. Alabama Telephone Co.,
576 F.2d 593 (5th Cir. 1978) 6

Meritcare Inc. v. St. Paul Mercury Insurance Co.,
166 F.3d 214 (3d Cir. 1999) 3

Morrison v. Allstate Indemnity Co.,
228 F.3d 1255 (11th Cir. 2000) 6

Rosmer v. Pfizer Inc.,
263 F.3d 110, *reh'g and reh'g en banc denied*,
___ F.3d ___ (4th Cir. 2001) 4

Smith v. GTE Corp.,
236 F.3d 1292 (11th Cir. 2001) 6

Snyder v. Harris,
394 U.S. 332 (1969).....7

Tapscott v. MS Dealer Service Corp.,
77 F.3d 1353 (11th Cir. 1996) 5-7

Trimble v. Asarco, Inc.,
232 F.3d 946 (8th Cir. 2000) 3

Zahn v. International Paper Co.,
414 U.S. 291 (1973)..... *passim*

STATUTES

28 U.S.C. § 1332..... i

28 U.S.C. § 1367..... *passim*

28 U.S.C. § 1447(c) 1, 2

28 U.S.C. § 1447(d) 1

MISCELLANEOUS

5 James Wm. Moore, *et al.*, *Moore's Federal Practice*
(3d ed. 1998) 4

14B Charles A. Wright, *et al.*, *Federal Practice*
and Procedure (3d ed. 1998) 4

INTRODUCTION

There is undoubtedly a conflict among the circuits over whether 28 U.S.C. § 1367 partially overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and provides supplemental jurisdiction in diversity cases over claims of class members that do not satisfy the amount-in-controversy requirement—if a named plaintiff's claims satisfy that requirement. But this case does not present that conflict and is not the proper vehicle for resolving it. Indeed, the Ninth Circuit *agreed* with petitioner that § 1367 overruled *Zahn*'s holding that each class member must satisfy the amount-in-controversy requirement. Even so, the Ninth Circuit ruled against petitioner because there are independent reasons why there is no federal jurisdiction over the class claims in this case. On the dispositive issues, there is no conflict among the circuits, and no reason for this Court to grant certiorari.

I.

THIS CASE IS A PROCEDURALLY INAPPROPRIATE VEHICLE FOR CONSIDERING WHETHER § 1367 OVERRULES *ZAHN*

This case comes to the Court in a peculiar procedural posture, such that the issue of federal jurisdiction over the underlying class claims is only indirectly presented. The case was originally filed in state court, and petitioner twice unsuccessfully attempted to remove it. Each time, the district court remanded. Remand orders are, of course, unappealable. 28 U.S.C. § 1447(d). Following the second remand, the state action was eventually dismissed, without plaintiffs ever filing a class certification motion.

After petitioner's second successive improper removal, however, the district court sanctioned petitioner under Rule 11 and ordered payment of respondents' attorney fees under 28 U.S.C. § 1447(c). Because only the imposition of sanctions and fees was appealable, only that subject was before the Ninth Circuit in this case.

The Ninth Circuit reversed the award of sanctions, holding that because petitioner's arguments concerning *Zahn* were not frivolous, they could not be the basis for Rule 11 sanctions. Thus, the only issue that remains is whether the Ninth Circuit correctly held that the district court did not abuse its discretion in awarding respondents the fees they incurred as a result of remand. The Ninth Circuit's ruling that the fee award was proper was not, however, based on the court's resolution of the *Zahn* issue. Rather the court ruled that even granting that § 1367 overruled *Zahn*, supplemental jurisdiction over class members' claims that fell below the jurisdictional amount could only be exercised if there was a *named* class member whose claims satisfied the amount-in-controversy requirement—which there concededly was not. The court of appeals' statements about the merits of the *Zahn* issue were therefore unnecessary to its holding. The Ninth Circuit also ruled that the class members' individual punitive damages and attorney fee claims could not be aggregated to satisfy the jurisdictional amount. Thus, the Ninth Circuit reasoned, the removal had been improper, and an award of attorney fees under § 1447(c) was a permissible exercise of the district court's discretion.

At best, therefore, the question whether § 1367 overrules *Zahn* is theoretically present in this case only to the extent that a resolution of that question adverse to petitioner would constitute an alternative ground for sustaining the Ninth Circuit's affirmance of the district court's fee award. But the *Zahn* issue would only need to be reached if the Ninth Circuit were incorrect in its ruling that at least one named plaintiff must satisfy the amount-in-controversy requirement, and, as shown below, there is no reason for this Court to review the correctness of the Ninth Circuit's decision on that point.

Moreover, even if petitioner were to prevail both on the named plaintiff issue and on the *Zahn* issue, the result would not be a judgment in its favor on the fee award. Rather, the case would still have to be remanded for a determination

whether the district court's remand order was correct, which, in turn, would require a factual finding as to whether any unnamed class member had a claim exceeding $75,000. That would probably at least require establishing not only that some absent class member had numerous Chrysler vehicles, but also that they had all manifested damage and that the resulting claim reached $75,000. Discovery and factfinding concerning the value of claims in a never-certified and now-dismissed class action would hardly constitute a worthwhile use of federal judicial resources.

II.

THE COURTS AGREE THAT A NAMED PLAINTIFF IN A DIVERSITY CLASS ACTION MUST SATISFY THE AMOUNT-IN-CONTROVERSY REQUIREMENT

Petitioner urges this Court to consider the Ninth Circuit's holding that the claims of one or more named plaintiffs must reach the jurisdictional amount, but identifies no basis upon which that issue merits this Court's attention. Whatever the status of *Zahn* following the enactment of § 1367, the federal courts of appeals are unanimous in agreeing that *at least one named plaintiff* must satisfy the amount-in-controversy requirement for a federal court to entertain a diversity-based class action.

Of course, in those circuits that have held that *Zahn* survives § 1367 in its entirety, the named plaintiffs, like all the other class members, must each have claims that reach the jurisdictional amount. *See Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631 (10th Cir. 1998).

The circuits that have held that § 1367 overruled *Zahn* also agree that at least one named plaintiff must satisfy the amount-in-controversy requirement. In *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995), *aff'd by an equally divided Court*, 529 U.S. 333 (2000), the Fifth Circuit empha-

sized that the claims of the named plaintiffs did exceed the jurisdictional amount, *id.* at 526-27, and held that in such circumstances, "a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, *as did the class representatives*." *Id.* at 529 (emphasis added).

Similarly, the Seventh Circuit, while holding that § 1367 displaced *Zahn*'s ban on supplemental jurisdiction over class members whose claims do not reach the jurisdictional amount, has stressed that "*[a]t least one named plaintiff must satisfy the jurisdictional minimum.*" *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997) (emphasis added). And the Fourth Circuit, the latest court to hold *Zahn* overruled by § 1367, has agreed "that § 1367 confers supplemental jurisdiction in diversity class actions, *so long as one named plaintiff has a claim giving a federal court original jurisdiction.*" *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114 (emphasis added), *reh'g and reh'g en banc denied*, __ F.3d __ (4th Cir. 2001).

In short, regardless of their views on *Zahn*'s continued vitality, all the federal courts of appeals that have addressed the issue have agreed with the Ninth Circuit that federal jurisdiction may not be exercised over a diversity class action unless at least one named plaintiff satisfies the amount-in-controversy requirement. A leading commentator agrees with the courts. 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 23.07[3][c] at 23-47 (3d ed. 1998) ("[E]ven if 28 U.S.C. § 1367 reverses *Zahn* ... the statute does not permit supplemental jurisdiction over a class action in which *unnamed* class members meet the amount-in-controversy requirement, but the named plaintiff does not.") (emphasis in original); *see also* 14B Charles A. Wright, *et al.*, *Federal Practice and Procedure*, § 3704, at 172-73, n. 84 (3d ed. 1998) (citing cases).

By contrast, petitioner cites not one federal case at any level that supports its position that supplemental jurisdiction may be invoked to support federal jurisdiction over an uncertified class action in which the named plaintiffs do not satisfy the amount-in-controversy requirement. Given the complete absence of any support for petitioner's position on the dispositive issue, this Court should not undertake to review the Ninth Circuit's holding on this point. And because a grant of certiorari on this independent issue, *and* a resolution of it contrary to the lower federal courts' uniform rulings, would be necessary before this Court could reach the *Zahn* issue (and before petitioner could prevail in this case), review of the *Zahn* question should be denied as well.

III.

THERE IS NO REASON TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT PUNITIVE DAMAGES CLAIMS MAY NOT BE AGGREGATED TO SATISFY THE JURISDICTIONAL AMOUNT

Petitioner also seeks review by this Court of its alternative theory of federal jurisdiction—namely, that even if none of the individual plaintiffs has a claim that reaches the jurisdictional amount, the punitive damages claims of all the class members may be aggregated to satisfy the amount-in-controversy requirement. Petitioner contends that this issue has produced disarray in the federal courts of appeals. But petitioner's attempt to conjure up some disagreement among the lower courts on this issue cannot obscure one fundamental fact: *The courts of appeals unanimously agree that punitive damages sought by a class may not be aggregated to satisfy the amount-in-controversy requirement.*

Petitioner's attempt to obfuscate this issue rests on decisions of the Fifth and Eleventh Circuits that those courts have subsequently disavowed. In *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), and *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), panels of those circuits

held that, under the laws of Mississippi and Alabama, respectively, members of a class had a "common and undivided interest" in a punitive damages award, and thus a claim for punitive damages on behalf of a class could be aggregated to reach the jurisdictional amount.

Subsequent panels of both the Fifth and Eleventh Circuits, however, have recognized that the holdings of *Allen* and *Tapscott* are inconsistent with a prior ruling of the old Fifth Circuit, *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978), which forbids aggregation of punitive damages claims regardless of peculiarities of state law. In both the Fifth and Eleventh Circuits, any conflict between the decisions of two or more panels is resolved in favor of the earliest one to address the issue. Thus, in both circuits, the rule of *Lindsey* remains binding, and punitive damages claims on behalf of a class may not be aggregated for purposes of the amount-in-controversy requirement. *See H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 214 (2001); *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 (11th Cir. 2001); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1264 (11th Cir. 2000); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000).*

The rules prevailing in the Fifth and Eleventh Circuits are thus entirely consistent with the rule applied by the Ninth

---

* Even if there were uncertainty regarding the status of *Allen* and *Tapscott* in their respective circuits, that would be a matter for those circuits to consider en banc, not a basis for a grant of certiorari by this Court—as this Court's recent denial of certiorari in *H&D Tire* helps confirm. Moreover, even if *Allen* and *Tapscott* remained good law in the circuits that issued them, they would be of little assistance to petitioner because they turn on state law regarding punitive damages, and petitioner has not established that punitive damages claims are "common and undivided" as a matter of California law, which applies here. In any event, the characterization of such claims as a matter of state law would hardly be an issue meriting this Court's attention.

Circuit in this case, as well as holdings of the Second, Seventh, Eighth and Tenth Circuits. *See* Petition at 22. By contrast, the petitioner cites *no* appellate decisions (aside from the discredited panel holdings in *Allen* and *Tapscott*) that support its position. Thus, as petitioner grudgingly acknowledges (Petition at 22), all seven courts of appeals that have addressed the issue have reached the same result.

Seeking to make a virtue of necessity, petitioner argues that because so many courts of appeals have rejected its position on this issue, "further percolation" of the issue is unnecessary. Petition at 22. But the reason review should be denied here is not that the issue is a novel one that needs to "percolate" through the courts. Rather, the reason this Court should decline review is that the rule in question is a settled one that does not pose a conflict demanding resolution.

Petitioner's principal remaining argument for review of this issue is that the decision below is incorrect. Of course, the alleged incorrectness of a rule on which the courts of appeals are in broad agreement is not a compelling basis for a grant of certiorari. In any event, petitioner's contention that the decision below is wrong is unpersuasive.

This Court has long held that the individual claims of class members cannot be aggregated to satisfy the jurisdictional amount requirement unless the claim of the class is a joint claim to a recovery in which the plaintiffs "have a common and undivided interest." *Snyder v. Harris*, 394 U.S. 332, 335 (1969). As Judge Posner has explained, however, claims of multiple plaintiffs for punitive damages are not "common and undivided" because "[a] plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant." *In re Brand Name Prescription Drugs*, 123 F.3d at 608-09. Although there arguably may be a constitutional limit at some point to the "piling on of awards by different courts for the same act," this argument "is unlikely to succeed to the point

of converting entitlements to punitive damages from individual to collective entitlements." *Id.* at 609. Until at least one appellate court accepts the dubious notion that punitive damages claims are collective, there is no reason for this Court to address the issue.

Finally, petitioner suggests that the Court should address the aggregation of punitive damages issue because of its supposed "interconnection ... to the *Zahn*/1367 question." Petition at 22. The "interconnection," however, seems to have eluded the federal courts of appeals, since even those courts that have disagreed on the *Zahn*/1367 issue (for example, the Seventh and Tenth Circuits) have agreed that punitive damages claims may not be aggregated. In any event, any alleged "interconnection" of the punitive damages issue to the *Zahn* issue hardly justifies review in this case, since, as explained above, the *Zahn* issue itself is not properly presented.

IV.

THIS COURT NEED NOT GRANT REVIEW TO PROVIDE "GUIDANCE" TO THE LOWER COURTS CONCERNING JURISDICTIONAL DISCOVERY

Finally, petitioner suggests that the Court grant review to provide "guidance" to the district courts concerning discovery on jurisdictional issues. Petition at 28. But the case hardly presents an occasion for providing such guidance, since the Ninth Circuit did not address any questions about the scope of discovery. Moreover, on the dispositive issues, no discovery was necessary. As the Ninth Circuit stated, petitioner did "not contend that any of the named plaintiffs in this case has an individual claim for damages that exceeds $75,000." Petition App. 22a. Thus, there was clearly no need for discovery on that point. And the question of aggregation of punitive damages is a pure issue of law, as to which no discovery would be relevant. Petitioner's plea for an advisory opinion on jurisdictional discovery thus adds nothing to its argument that the case merits this Court's attention.

CONCLUSION

Petitioner seeks to bootstrap a conflict over an issue not properly presented into a grant of certiorari on questions that do not merit the Court's attention because the courts of appeals are in complete agreement on them. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Scott L. Nelson
Counsel of Record
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Guido Saveri
R. Alexander Saveri
Saveri & Saveri, Inc.
One Embarcadero Center
Suite 1020
San Francisco, CA 94111
(415) 217-6810

Attorneys for Respondents

December 2001

Supreme Court, U.S.
FILED
DEC 21 2001
CLERK

No. 01-688

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

URSULA GIBSON, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONER

Of Counsel:

STEVEN B. HANTLER
ALLAN M. HUSS
MARY E. WALDRUP
DAIMLERCHRYSLER CORP.
1000 Chrysler Drive
Auburn Hills, MI 48326

JEFFREY S. SUTTON
(*Counsel of Record*)
MICHAEL S. FRIED
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215

Counsel for Petitioner

12pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

In re Abbott Labs., 51 F.3d 524 (5th Cir.), *reh'g denied*, 65 F.3d 33 (5th Cir. 1995) 3
Chiartas v. Bavarian Motor Works AG, 106 F. Supp. 2d 872 (S.D.W. Va. 2000) 6
Free v. Abbott Labs., 529 U.S. 333 (2000) 1
Free v. Abbott Labs., 176 F. 3d 298 (5th Cir. 1999) 3
Free v. Abbott Labs., 164 F. 3d 298 (5th Cir. 1999) 3
Morrison v. Allstate Indem. Co., 228 F.3d 1255 (11th Cir. 2000) 6
Olden v. LaFarge Corp., 203 F.R.D. 254 (E.D. Mich. 2001) 6
Synder v. Harris, 394 U.S. 332 (1969) 7
Williams v. Best Buy Co., 269 F.3d 1316 (11th Cir. 2001) 8
Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) 1, 3-7

STATUTES

28 U.S.C. § 1367 ..... 1, 3-6

REPLY BRIEF FOR PETITIONER

After two rounds of briefing, it is clear that this case raises two unanswered federal questions that are recurring in nature and that long have preoccupied the lower courts. The Court, as the petition showed, has previously granted review of the first question — whether *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), survived passage of 28 U.S.C. § 1367 — but ultimately affirmed the decision by an evenly divided court. *See Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000). And both questions, the petition showed, have prompted an unusual number of lower-court decisions, concern matters of pressing importance to the everyday workings of the state and federal courts, and have generated a form and volume of wasteful litigation that only this Court can cure. Since the filing of the petition, the Chamber of Commerce of the United States of America and the Products Liability Advisory Council — both of which filed *amicus* briefs in *Free* — have filed briefs *amici curiae* echoing each of these points and offering other reasons for granting the writ as well.

Respondents understandably take a different tack. But, in doing so, they do not contest the importance of the questions presented or the significance of the lower-court debate over the meaning of section 1367. The arguments that they do make ultimately misapprehend the grounds of the Ninth Circuit's decision, inexplicably ignore the inter-circuit split regarding the Ninth Circuit's distinction between named and unnamed class members, and fail to appreciate that resolution of the continuing vitality of *Zahn* is advanced (rather than undermined) by considering a case that involves unnamed claimants who satisfy the jurisdictional minimum. For these reasons, those set forth in the petition, and those elaborated below, DaimlerChrysler respectfully submits that the issue warrants the Court's immediate attention.

1. At no point do respondents raise any jurisdictional impediments to reviewing the questions presented. A final, appealable order is in place, and there is no independent and adequate state ground precluding review.

2. Respondents also conspicuously fail to dispute several arguments raised in the petition (Pet. 13-15, 20-22, 25), and seconded in the two *amicus* briefs — namely, that the questions presented are important, that they have generated a remarkable volume of lower-court litigation, and that the general non-appealability of remand orders impedes Supreme Court resolution of these essential jurisdictional issues.

3. Respondents primarily oppose certiorari on vehicle grounds. Whether considered singly or together, however, these arguments miss the mark.

a. Respondents initially suggest (Opp. 1) that both questions arise in a "peculiar procedural posture" because the case comes to the Court in the context of a challenge to an attorney-fee award. Yet they offer no explanation why the procedural status of the case will impede review, and in truth no such argument exists. Before addressing each question presented, the court of appeals squarely held that "review of a fee award under section 1447(c) must include a de novo examination of whether the remand order was legally correct." Pet. App. 6a (quotation omitted). Respondents did not challenge this standard of review below and they have not challenged it since. And today, they acknowledge (Opp. 2) that the Ninth Circuit upheld the fee award because it concluded that "the removal had been *improper*." (Emphasis added.) On this record, the fact that the issues arise through review of an attorney-fee award is legally and practically beside the point. The standard of review is the same either way. In other words, to the extent respondents mean to argue that the setting of the case will hinder review, they are simply wrong: The manner in which the Ninth Circuit resolved the issues necessarily (and helpfully) isolates them for further de novo review.

As the petition points out (Pet. 15), moreover, it will frequently be the case that review of remand/removal issues arises in procedurally unorthodox settings. One need look no further than *Free* and *Zahn* to illustrate the point. *Free* came to the Court after no less than three trips to the Fifth Circuit. *See* 176 F.3d 298 (5th Cir. 1999); 164 F.3d 270 (5th Cir. 1999); 51 F.3d 524 (5th Cir.), *reh'g denied*, 65 F.3d 33 (5th Cir. 1995). And *Zahn* itself came to the Court in the absence of any noted circuit split at all. What was true in *Free* and *Zahn* is true today: In this unique context, both issues are ripe for review and warrant the Court's time.

b. Also mistaken is respondents' second vehicle argument, which focuses on whether the Ninth Circuit *necessarily* decided that section 1367 overrules *Zahn*. Claiming that the Ninth Circuit ruled for DaimlerChrysler on the *Zahn* question and against it on the named/unnamed distinction, they maintain (Opp. 2) that the decision accordingly was not "based on the court's resolution of the *Zahn* issue" and that the survival of *Zahn* will present only an "alternative ground" for affirmance. This argument first misapprehends the Ninth Circuit's decision, then misreads *Zahn* itself.

Any doubts about the centrality of the Ninth Circuit's resolution of the *Zahn* issue to the outcome in this case are removed merely by reading the lower court's decision. The analysis of this issue is not only extensive (Pet. App. 7a-19a) but also more extensive than most (if not all) other appellate decisions on the point. Add to this the Ninth Circuit's characterization of its decision as a "holding" (Pet. App. 19a; *accord* Pet. App. 8a ("[W]e . . . hold that *Zahn* is overruled by § 1367")), and it becomes clear that the *Zahn* issue was squarely presented, was definitively decided, and constitutes binding precedent in the Ninth Circuit. It thus is plainly eligible for further review.

But this amounts to a mere debater's point in comparison to the second flaw in this argument. Not only is it incorrect to say (Opp. 2) that resolution of the *Zahn* issue was "unnecessary to its holding," but it is incorrect to suggest that this was even a realistic possibility. Assume, consistent with respondents' theory, that the Ninth Circuit had tried to affirm solely on the basis of the named/unnamed party distinction — which is to say, that it had rejected DaimlerChrysler's argument exclusively on the ground that the only plaintiffs satisfying the jurisdictional minimum were unnamed claimants and that the compensatory-damages claims of these individuals are of no moment in ascertaining whether supplemental jurisdiction exists under section 1367. That holding would not have been reached without also considering whether *Zahn* survived the passage of section 1367. Why? In *Zahn* itself, each of the named class representatives satisfied the jurisdictional minimum, 414 U.S. at 291-92, meaning that the *Zahn* rule — that all members of a class must satisfy the jurisdictional minimum — necessarily turned on the relevance of the claims of unnamed class members. Otherwise, *Zahn* would have come out differently and would have upheld jurisdiction over the class in that case. Indeed, were respondents' vehicle arguments correct, it would follow (implausibly) that the *Zahn* facts presented an inadequate vehicle for announcing the *Zahn* rule itself. Under these circumstances, the court of appeals did not have the option of ruling against DaimlerChrysler solely on the basis of the distinction between named and unnamed class members, which presumably is why it looked at both questions together and why it gave such thorough consideration to the *Zahn* issue at the outset.

c. That leaves one final vehicle question that is left unstated but remains implicit in respondents' argument. Even if the Ninth Circuit meant to resolve the *Zahn* issue as a holding binding within the circuit and even if the court was required to do so in order to reach its conclusion about named and unnamed claimants, does it follow that *this* Court would

realistically and practically need to address the continuing vitality of *Zahn* in the context of this case? The answer is yes.

This case squarely implicates the *Zahn* issue for the same reason that it was implicated in the court of appeals. That is because there are only two ways to analyze the issue and both of them implicate the vitality of *Zahn*. First approach: Look initially at whether section 1367 overrules *Zahn*; if it does, proceed (as the Ninth Circuit did) to the named/unnamed issue; if it does not, then plaintiffs prevail on the first question presented. Second approach: Look initially at whether the compensatory-damages claims of unnamed plaintiffs are relevant to the jurisdictional inquiry; but, in doing that, the Court would need to confront the argument that *if Zahn* remains good law, it follows that the claims of unnamed plaintiffs *are* relevant to the jurisdictional inquiry. Under either approach, as the Ninth Circuit recognized, one cannot fairly answer the first question presented in this case without considering the vitality of *Zahn*. In the final analysis, then, by arguing that the jurisdictionally sufficient claims of unnamed class members make this case a weak vehicle for resolving the *Zahn* question, respondents get the issue exactly backwards: These facts not only present an adequate vehicle for resolving this question, *see* Pet. App. 20a (accepting DaimlerChyrsler's allegation that "several unnamed class members have claims for amounts in excess of $75,000"), but they may well present a superior vehicle for doing so.

4. In addition to presenting a fact pattern that squarely asks whether *Zahn* survives section 1367, the first question presented also implicates a division of lower-court authority. At the same time respondents argue (Opp. 5) that "petitioner cites not one federal case at any level that supports its position that supplemental jurisdiction may be invoked to support federal jurisdiction over an uncertified class action in which the named plaintiffs do not satisfy the amount-in-controversy requirement," they conspicuously offer no response to the portion of the petition that does that very thing.

Wholly apart from the unchallenged circuit split regarding the general applicability of section 1367, the petition showed (Pet. 11-12) that the lower courts have issued conflicting decisions about whether an overruling of *Zahn* covers cases where unnamed class members, but not named plaintiffs, satisfy the jurisdictional minimum. The petition maintained (Pet. 12) that the Eleventh Circuit "expressly disagreed with the Ninth Circuit's distinction between named and unnamed class members in the context of supplemental jurisdiction under section 1367" in *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255 (11th Cir. 2000), and noted that *Chiartas v. Bavarian Motor Works AG*, 106 F. Supp. 2d 872, 874 (S.D.W. Va. 2000), ruled likewise. *See also, e.g.*, *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 264-65 (E.D. Mich. 2001) (holding "that 28 U.S.C. § 1367 confers on the Court subject matter jurisdiction over claims by putative class members which do not entail $75,000 in controversy but which form part of the same case or controversy as claims by *other class members* which exceed the jurisdictional amount" (emphasis added)). These cases *directly* support DaimlerChrysler's lower-court conflict allegations, and respondents' utter failure to acknowledge, let alone address, them only confirms the absence of any colorable ground for opposing review.

5. Respondents next oppose (Opp. 5-7) review of the punitive-damages question on the ground that no lower-court "disarray" exists over the question. In the first place, the remarkable pattern of push-me-pull-me decisions from the Fifth and Eleventh Circuits illustrates that the lower courts are anything but certain about how to resolve this issue. *See* Pet. 20-21. In the second place, the continuing pattern of district-court decisions in circuits that have not addressed the question illustrates that the lower courts are hardly falling into line when it comes to answering this question. *See* Pet. 22. And in the third place, no meaningful explanation exists for allowing the issue to continue to percolate any longer. Seven courts of appeals now have issued decisions on point, the decisions do

not approach the problem from the same analytical perspective, and the decision they each try to interpret (*Snyder v. Harris*, 394 U.S. 332 (1969)) has not been elaborated in 32 years and has not been interpreted since several amendments to the relevant federal statutes and rules.

Nor do respondents meaningfully counter the interconnection of this issue with the *Zahn* question. As the petition demonstrated (Pet. 23), the Ninth Circuit believed that the claims of unnamed class members could be considered for punitive-damages purposes but not for compensatory-damages purposes when considering whether the amount-in-controversy threshold had been satisfied. Both approaches cannot simultaneously be correct, and it confirms the strength of the petition that it presents an opportunity to consider both issues at the same time. Proving the point, respondents' principal answer to the first question presented is to make a legal argument — namely, that the claims of unnamed parties never matter in determining the amount in controversy — that confirms all seven courts of appeal (including the Ninth Circuit here) have gotten the punitive-damages inquiry wrong. For it will invariably be the case (and it was certainly the case here) that a punitive damages claim will push the amount in controversy over $75,000 per named plaintiff, whether the punitive damages are aggregated or allocated to each named party.

6. Respondents' brief defense (Opp. 7-8) of the Ninth Circuit's decision on the punitive-damages issue does not overcome this weakness. All that they note is that *individual* punitive awards are not treated as "common and undivided" under *Snyder v. Harris*, 394 U.S. 332 (1969), but that of course does not control how such claims should be treated in the class-action context, as the extensive lower-court decisions on the point illustrate. And the footnoted claim (Opp. 6 n.*) that "petitioner has not established that punitive damages claims are 'common and undivided'" under California law is belied by, and ignores, that very showing in the petition. *See* Pet. 23-24.

The claim at any rate is irrelevant given the nature of the Ninth Circuit's ruling, which was to announce a blanket *federal* prohibition against the aggregation of punitive damages, regardless of the underlying State law.

7. Respondents next argue (Opp. 8) that "the Ninth Circuit did not address any questions about the scope of discovery." But the petition did not raise discovery issues as an independent ground for review. Rather, DaimlerChrysler demonstrated (Pet. 26-28) that resolution of the questions that *are* presented in this case would have the salutary effect of providing much needed guidance in this confused area. *See generally Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) ("If the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed."). Respondents offer no response to this argument.

8. The *amicus* briefs, like the briefs filed by the same parties in *Free*, bolster each of these points, and more. Both briefs detail the practical importance of the issues in this case, the widespread number of situations in which they arise, the difficulty of obtaining appellate review of these issues and the compelling need to prevent forum shopping by parties eager to take advantage of favorable circuit precedent covering one State but not another. In word and deed, the *amici* briefs demonstrate that the issues raised in the petition are squarely presented and urgently demand the Court's attention.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Of Counsel:

STEVEN B. HANTLER
ALLAN M. HUSS
MARY E. WALDRUP
DAIMLERCHRYSLER CORP.
1000 Chrysler Drive
Auburn Hills, MI 48326

JEFFREY S. SUTTON
(*Counsel of Record*)
MICHAEL S. FRIED
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215

Counsel for Petitioner

December 2001

Supreme Court, U.S.
FILED
DEC 10 200

(5)

No. 01-688

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION

Petitioner,

v.

URSULA GIBSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

EVAN M. TAGER
Counsel of Record
CHRISTOPHER C. WANG
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 4

American Bankers Ins. Co. v. Alexander, No. 98-IA-00046-SCT, 97-IA-01271, 2001 WL 83952 (Miss. Feb. 1), cert. denied, 122 S. Ct. 324 (2001) 9

Andrews v. American Tel. & Tel. Co., 95 F.3d 1014 (11th Cir. 1996) 4, 5

Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997) 4

Arnold v. State Farm Mut. Auto. Ins. Co., No. 99-L-0896 (St. Clair County, filed Oct. 22, 1999) 14

Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242 (Ill. App. Ct. 2001) 13

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 3

Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999) 3

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 4

Busani v. United Servs. Auto. Ass'n, No. 99-2-68217-1 Wash. Super. Ct. 2001) 10-11

Capone v General Motors Corp., No. 99-L-1127 (Madison County, filed Nov. 17, 1999) 14

TABLE OF AUTHORITIES — Continued

Page

Carlton v. Trinity Universal Ins. Co., 32 S.W.3d 454 (Tex. App.-Houston 2000) 10

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 3, 4, 5

Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998) 4, 5

Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792 (11th Cir. 1999) 15

Ex parte Green Tree Fin. Corp., 723 So. 2d 6 (Ala. 1998) 8

Ex parte Masonite Corp., 681 So. 2d 1068 (Ala. 1996) 7

Ford Motor Co. v. Sheldon, 22 S.W.3d 444 (Tex. 2001) 9

Free v. Abbott Laboratories, Inc., 529 U.S. 333 (2000) 16

Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) 4

Hare v. State Farm Mut. Auto. Ins. Co., No. 2-98 CV 65, order (N.D. Ind. Mar. 26, 2001) 10

Hobbs v. State Farm Mut. Auto. Ins. Co., No. 99-L-1068 (Madison County, filed Nov. 2, 1999) 14

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) .. 4

TABLE OF AUTHORITIES — Continued

Page

In re Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214 (E.D. La. 1998) 4

In re Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217 (W.D. Mich. 1998) 4, 5

In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417 (E.D. La. 1997) 4, 8

In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) 4

International Paper Co. v. Naef, No. A-28 (filed July 3, 1997) 8

Johnson v. State Farm Mut. Auto. Ins. Co., 754 P.2d 330 (Ariz. Ct. App. 1988) 10-11

Marascalco v. International Computerized Orthokeratology Soc'y, Inc., 181 F.R.D. 331 (N.D. Miss. 1998) 4

Merrill v. State Farm Mut. Auto. Ins. Co., No. 497-316, order (S.D. Ga. June 11, 1998) 10

Moorhead v. State Farm Mut. Auto. Ins. Co., No. 95-AR-0668-5 (N.D. Ala. Sept. 12, 1997) 11

Murray v. State Farm Mut. Auto. Ins. Co., No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997) 11

TABLE OF AUTHORITIES — Continued

Page

Naef v. Masonite Corp., No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995) (Ala. 1996) 7

Paul v. Country Mut. Ins. Co., No. 99-L-995 (Madison County, filed Oct. 13, 1999) 14

Phillips v. Ford Motor Co., No. 99-L-1041 (Madison County, filed Oct. 26, 1999) 14

Ray v. Farmers Ins. Exch., 200 Cal. App. 3d 1411 (1988) 11

Rios v. Allstate Ins. Co., No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998) 11

Rios v. St. Paul Fire & Marine Ins. Co., No. 99-L-1125 (Madison County, filed Nov. 16, 1999) 14

Schwartz v. Upper Deck Co., 183 F.R.D. 672 (S.D. Cal. 1999) 4

Siegle v. Progressive Consumers Ins. Co., 788 So. 2d 355 (Fla. Dist. Ct. App. 2001) 10

Siler v. State Farm Mut. Ins. Co., No. 99-L-863 (Madison County, filed Nov. 30, 1999) 14

Siler v. State Farm Mut. Ins. Co., No. 99-L-863 oral ruling (Ill. Cir. Ct., Madison Cty. Aug. 16, 2000) 10

Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880 (5th Cir. 1973) 4

TABLE OF AUTHORITIES — Continued

Page

Sitton v. State Farm Mut. Auto. Ins. Co., No. 00-2-10013-2 (Wash. Super. Ct. 2000) 10

Smith v. State Farm Mut. Auto. Ins. Co., No. 89-CP-24-852 (S.C. Ct. Common Pleas Feb. 23, 1990) 10

Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998) 4

State Farm Mut. Auto. Ins. Co. v. Speroni, No. 97-2063 (filed June 22, 1998) 12

Stone v. SBU, Inc., No. 99-L-977 (Madison County, filed Oct. 7, 1999) 14

Strasen v. Allstate Ins. Co., No. 99-L-1040 (Madison County, filed Oct. 26, 1999) 14

Western Elec. Co. v. Stern, 544 F.2d 1196 (3d Cir. 1976) 4

Winn v. Associates First Capital Corp., No. 99-L-1227 (Madison County, filed Dec. 23, 1999) 14

Statutes and Rules

28 U.S.C. § 1332 . . . . . 1, 2, 15, 16

28 U.S.C. § 1367 . . . . . 1, 2, 3, 15, 16, 17

28 U.S.C. § 1367(b) 16

28 U.S.C. § 1407 15

TABLE OF AUTHORITIES — Continued

Page

28 U.S.C. § 1447(d) 16

Colo. Rev. Stat. Ann. § 42-9-107 13

Ind. Code § 27-4-1.5-8 13

Miss. R. Civ. P. 20 9

N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(5)(ii) 13

Or. Rev. Stat. § 746.287(1) 13

Or. Rev. Stat. § 746.292(4)(b) 13

R.I. Gen. Laws 1956 § 27-10.2-2 13

W. Va. Code § 46A-6B-3 13

Fed. R. Civ. P. 23 . . . . . 1, 2, 4, 16

Miscellaneous

Class Action Litigation–A Federalist Society Survey, 1 CLASS ACTION WATCH 6-7

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) (statement of Representative James Moran), available at http://www.house.gov/judiciary/41155.htm 5, 14

Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER, June 17, 2001 9

TABLE OF AUTHORITIES — Continued

Page

Mark Ballard, *Mississippi Becomes A Mecca for Tort Suits*, NAT'L L.J., April 30, 2001, at A1 9-10

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts,* WALL ST. J., Oct. 10, 1996, at B1 6

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) (statement of Dr. John B. Hendricks), available at 1998 WL 122544 6

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) (statement of John W. Martin, Jr.), available at 1998 WL 8993263 ..... 14, 15

Stateside Associates, *Lawsuits in State Courts: A Case Study in Alabama* (1998) 6

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

Amicus's members have been subjected to abusive class actions in state courts on a regular basis. They accordingly have a strong interest in supporting Congress's decision to confer federal jurisdiction over the claims of all members of a Rule 23 class action when the claims of some class members satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332 and in ensuring that Congress's intent is not thwarted by a crabbed interpretation of 28 U.S.C. § 1367 that limits supplemental jurisdiction to cases in which a named plaintiff meets the jurisdictional minimum amount established in Section 1332.[1]

---

[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Section 1367 unambiguously authorizes the federal courts to exercise supplemental jurisdiction over the claims of all members of a Rule 23 class action, so long as the courts have original jurisdiction over the claims of some of the class members. Although the Ninth Circuit correctly reached this conclusion, it went on to hold that only the claims of the named plaintiffs may be considered in determining whether the amount-in-controversy requirement of 28 U.S.C. § 1332 has been satisfied. In doing so, it essentially eviscerated Congress's effort to expand supplemental jurisdiction by allowing plaintiffs' counsel to evade federal jurisdiction simply by limiting their class representatives to those whose claims fail to meet the jurisdictional minimum amount established in Section 1332. Certiorari is warranted to resolve the confusion in the courts as to the proper interpretation of Section 1367 and to ensure that Congress's intent in amending that provision is not thwarted.

ARGUMENT

As the Fourth, Fifth, Seventh, and Ninth Circuits have held, 28 U.S.C. § 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of all members of a Rule 23 class action so long as the courts have original jurisdiction over the claims of some class members. In the diversity context, this means that, if the named class members do not hail from the same state as any of the defendants and at least one has claims that exceed the monetary threshold in 28 U.S.C. § 1332, the federal courts have supplemental jurisdiction over the claims of the absent class members without regard to the value of those claims. Although the Ninth Circuit correctly reached this conclusion, it deprived that ruling of much practical impact by going on to hold that only the claims of the named plaintiffs may be considered in determining whether the amount-in-controversy requirement of Section 1332 has been satisfied. Because the petition for writ

of certiorari persuasively demonstrates the fallacy of the Ninth Circuit's approach, we will not here burden the Court with an additional analysis of the statute. Instead, we will demonstrate that broadening federal jurisdiction over class actions was a perfectly rational thing for Congress to do and that Congress could not have intended that Section 1367 be interpreted in a manner that would allow plaintiffs' counsel to evade federal jurisdiction through artful pleading.

1. The original purpose of diversity jurisdiction was to protect out-of-state parties from being treated unfairly by local courts. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.). With the advent of the class action, the need for such protection has multiplied. As Judge Easterbrook recently explained:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). The Fifth Circuit has similarly noted:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted).

2. The federal courts have recognized that, in order to prevent the class action device from being used as a weapon of

extortion, it is necessary to apply the requirements of Rule 23 rigorously. See, *e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *Castano*, 84 F.3d at 740. In particular, the federal appellate courts have uniformly refused to permit class actions when the claims of the class members would require individualized proof and the defendant would have individualized defenses to those claims. See, *e.g., Broussard*, 155 F.3d at 340-344; *Sprague v. General Motors Corp.*, 133 F.3d 388, 397-399 (6th Cir. 1998) (en banc); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023-1025 (11th Cir. 1996); *Castano*, 84 F.3d at 744-745; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626-630 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854-856 (9th Cir. 1982); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-883 (5th Cir. 1973).[2] Indeed, several federal courts have recognized that it would violate the defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized. See, *e.g., In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-89 & n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997).

The federal courts also have refused to paper over differences in the laws of the various states simply to make a

---

[2] The federal district court decisions refusing to certify classes on this ground are too numerous to list. A representative sample includes: *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 676-680 (S.D. Cal. 1999); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 220-222 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455-457 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220-222 (E.D. La. 1998); *Marascalco v. International Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 338-339, 340 (N.D. Miss. 1998).

case manageable as a multi-state class action. See, *e.g.*, *Andrews*, 95 F.3d at 1024, 1025; *Castano*, 84 F.3d at 749-750; *Jackson Nat'l Life*, 183 F.R.D. at 223; *Chin*, 182 F.R.D. at 457-462.

3. Regrettably, the state courts, as a group, have been far more lax in enforcing statutory and constitutional limitations on class actions.[3] As one Member of Congress recently testified at a House hearing:

> Opportunistic lawyers have identified those states and particular judges where the class action device can be exploited. The most significant of these devices is the certification of the class itself. For many companies, it is easier and less costly to settle a class action suit once it has been certified than to fight it in a foreign jurisdiction before a potentially unfriendly judge and jury. Some state courts, however, do not give the defendants a fighting chance. They routinely certify classes before the defendant has been served with a complaint and given an opportunity to defend itself. In one case, a state court judge certified the class before the case was even filed in the court.

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) (statement of Representative James P. Moran), available at http://www.house.gov/judiciary/41155.htm (hereinafter "Moran Testimony").

The more sophisticated members of the plaintiffs' class action bar have managed to identify specific counties within

---

[3] We are not suggesting that every state court (or even the majority) has acquiesced in class action abuse, but simply that such abuse occurs with sufficient regularity in the state court system to make it rational for Congress to have expanded federal jurisdiction over class actions.

particular states in which they can be virtually assured of finding a judge who will certify a case as a class action without regard to whether it can fairly be tried as one. As the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns * * *.
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges, many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts,* WALL ST. J., Oct. 10, 1996, at B1.

A few states have become particularly notorious for allowing extortionate class actions and running roughshod over the constitutional rights of out-of-state defendants and absent class members alike. For example, one study found that in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks at Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998), available at 1998 WL 122544).[4] Another study found that the number of class actions filed in Texas state courts rose by 820% between 1988 and 1998. See *Class Action Litigation–A Federalist Society Survey*, 1 CLASS

---

[4] Dr. Hendricks is the founder of an Alabama research and development company who appeared on behalf of the Chamber.

ACTION WATCH, at Figure 1.[5] That rate of increase is significantly higher than in the federal courts, where the number of pending class actions increased during the same ten-year period by 338%. *Ibid.*

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to dispense casually with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. For example, in 1996 a judge in Mobile County, Alabama, certified a nationwide class action alleging state law products liability, breach of warranty, negligence, and fraud claims on behalf of several million owners of homes on which the defendants' siding had been installed. In an opinion written by class counsel, the court brushed aside the constitutional choice-of-law problem, stating, without the slightest legal analysis, that "the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant individual issues." Order Certifying Plaintiff Class at 8, *Naef v. Masonite Corp.*, No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995) (reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1090 (Ala. 1996)). The court also gave short shrift to the contention that the claims were fact-specific and that the defendants were being denied the opportunity to prove defenses specific to the individual class members. *Ibid.* After the Alabama Supreme Court denied mandamus, the trial court held a "first-phase" trial limited to the issue of whether the defendants' products were defective. In that trial, the court purported to solve the dilemma of having to apply the laws of the 51 jurisdictions by simply making up its own law, amalgamating bits and pieces of the laws of the 51 jurisdictions into five different design defect standards that did not accurately represent the law of *any* State.

---

[5] A copy of this study has been lodged with the Clerk of the Court and served on the parties.

Meanwhile, another set of class action lawyers sought certification of an identical class in federal court. That court denied certification, holding that "[d]ifferences in state law and user facts overwhelm the common elements of plaintiffs' claims. Combined, these differences are so great as to make national class treatment unwieldy, unfair, and unlawful." *Masonite Corp. Hardboard Siding*, 170 F.R.D. at 425. It deemed inadequate the Alabama court's attempt to boil down the laws of 51 jurisdictions into five sets of "Esperanto instruction[s]," opining that "[t]he number of state products liability laws that confront Masonite and their doctrinal dissonance, cannot be glossed over casually." *Id.* at 422. The court concluded that "Due Process, the Seventh Amendment, * * * and Rule 23 make it impossible to accommodate the theoretical benefits of class treatment." *Id.* at 427. The defendants in *Naef* brought the Louisiana district court's ruling to the attention of the Alabama courts before what was to be the second phase of the class action trial, but the trial court refused to decertify the class, and the Alabama Supreme Court denied mandamus.[6]

The Alabama Supreme Court has recently begun to enforce the state-law and constitutional limits on class certification. See, *e.g.*, *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 10-11 (Ala. 1998) (ordering decertification of nationwide class because laws of different states would apply to different class members' claims and because the claims would present individual issues requiring subjective proof). Texas, which was

---

[6] For a fuller description of the constitutionally flawed procedures imposed in *Naef*, see Application for a Stay of Proceedings Pending the Filing of a Petition for a Writ of Certiorari to Review a Final Decision of the Supreme Court of Alabama, *International Paper Co. v. Naef*, No. A-28 (filed July 3, 1997). During the pendency of the stay application, the defendants — in what could hardly be described as a surprising move in view of the forum and the amount of compensatory and punitive damages claimed by the class — settled the case and withdrew the stay application.

similarly known as a hotbed of class action activity, has also of late tightened its requirements for class certification through its highest court. See, *e.g.*, *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000) (ordering decertification of class that was not clearly ascertainable). Unfortunately for class action defendants, these developments have done little to resolve the underlying problem. Class action plaintiffs and their attorneys have merely moved their "litigation road show" to more hospitable forums — in particular, Mississippi. See Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER, June 17, 2001 (noting that "[n]ews of Mississippi's multimillion-dollar verdicts has attracted trial lawyers from other states, particularly Texas and Alabama").

In a recent example of Mississippi's openness to mass tort suits, a Mississippi state court ordered mass joinder of claims alleging that the defendant had engaged in fraud and breach of fiduciary duties in connection with issuing collateral protection insurance policies, despite the refusal of a federal court to certify a class action based upon those very same claims.[7] The Mississippi Supreme Court affirmed the trial court's ruling, summarily rejecting the defendant's argument that joinder in a single lawsuit of hundreds of individual plaintiffs possessing multiple claims based upon different, highly fact-specific assertions would "violate [the defendant's] fundamental right to a fair and impartial trial." *American Bankers Ins. Co. v. Alexander*, No. 98-IA-00046-SCT, 97-IA-01271, 2001 WL 83952, at *6 (Miss. Feb. 1) (citations and internal quotation marks omitted), cert. denied, 122 S. Ct. 324 (2001). Use (and abuse) of the mass joinder device is now rampant in Mississippi. See Mark Ballard, *Mississippi Becomes A Mecca*

---

[7] Mississippi does not allow class actions, but instead permits joinder of multiple plaintiffs as parties if the plaintiffs assert a "right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences" and a "question of law or fact common to all these persons will arise in the action." Miss. R. Civ. P. 20.

for Tort Suits, NAT'L L.J., April 30, 2001, at A1 (noting that "Jefferson County has become a mecca for plaintiffs' lawyers eager to use Mississippi's unique law to secure jurisdiction over multinational corporations").

Nor is state-court class-action abuse simply a regional phenomenon. In November 2000, a Washington state court certified a class action on behalf of State Farm insureds alleging improper denials of first-party medical benefits provided by their automobile policies, despite its recognition that common issues did not predominate and the refusal of other state courts to certify multi-state class actions involving the same defendant, many of the same putative class members, and virtually identical legal claims.[8] *Sitton v. State Farm Mut. Auto. Ins. Co.*, No. 00-2-10013-2 (Wash. Super. Ct. 2000). More recently, a Washington state court certified a 27-state class action seeking "inherent diminished value" ("IDV") damages under the putative class members' automobile insurance policies, even though in many jurisdictions it remains a question of first impression whether IDV claims are legally cognizable even in individual actions, and courts in several other states have already held that they are not.[9] *Busani v.*

---

[8] See *Siler v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-863, oral ruling (Ill. Cir. Ct., Madison Cty. Aug. 16, 2000); *Merrill v. State Farm Mut. Auto. Ins. Co.*, No. 497-316, order (S.D. Ga. June 11, 1998); *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 89-CP-24-852, order (S.C. Ct. Common Pleas Feb. 23, 1990); *see also Hare v. State Farm Mut. Auto. Ins. Co.*, No. 2-98 CV 65, order (N.D. Ind. Mar. 26, 2001) (denying class certification after *Sitton* ruling).

[9] See, *e.g.*, *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 361 (Fla. Dist. Ct. App. 2001) (concluding that to require insurer to repair vehicle and compensate insured for vehicle's diminished value would improperly re-write insurance contract); *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 465 (Tex. App.-Houston 2000) (concluding as a matter of law that insurer cannot be held liable for IDV damages where it has fully repaired insured's automobile); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 754 P.2d

United Servs. Auto. Ass'n, No. 99-2-68217-1 (Wash. Super. Ct. 2001).

Finally, as a result of one Illinois state court's willingness to certify and try a 4.7-million member, 48-state class action against State Farm under Illinois law — despite the refusals of two federal courts and one state court from northern Illinois to certify similar (indeed smaller) classes[10] — southern Illinois has recently been added to the list of favorite venues for class action lawyers.[11]

A consortium of plaintiffs' lawyers from around the country filed the class action in state court in sparsely populated Williamson County, Illinois, on July 28, 1997, alleging that State Farm breached its contracts with its policyholders (which generally required State Farm to pay the amount necessary to restore damaged vehicles to pre-loss condition) and violated Illinois' consumer fraud statute by using the price of parts made

---

330, 331 (Ariz. Ct. App. 1988) (denying IDV claim and holding that insurer's "liability is limited by the terms of the policy to the cost of repairing the vehicle less any deductible payable by the insured"); *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 1417 (1988) ("To hold Farmers liable for the automobile's diminution in value would make Farmers an insurer of the automobile's cash value in virtually all cases and would render essentially meaningless its clear right to elect to repair rather than to pay the actual cash value of the vehicle at the time of loss.").

[10] See *Moorhead v. State Farm Mut. Auto. Ins. Co.*, No. 95-AR-0668-S (N.D. Ala. Sept. 12, 1997); *Murray v. State Farm Mut. Auto. Ins. Co.*, No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.*, No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998).

[11] To be sure, State Farm is an Illinois company and hence would not have been able to remove the suit. Our point in discussing it is simply to illustrate the kinds of abuses that go on in some state courts and that make the expansion of federal jurisdiction over class actions perfectly rational.

by companies other than the automakers or their licensees ("non-OEM parts") when determining how much to pay for repairs to its policyholders' vehicles. The trial court certified the class on the same day without waiting for State Farm to be served, much less file an opposition to class certification. The court eventually held a hearing and reconfirmed its ruling, notwithstanding State Farm's argument that the need to apply the laws of the 48 states represented in the class and the individualized factual determinations that would be required made it impossible to try the case as a class action consistent with due process.[12]

The 4.7 million class members had myriad makes and models of automobiles, and over 30,000 different non-OEM parts were specified in the 4.7 million repair estimates. Undaunted, the court proceeded to conduct a trial, in which the plaintiffs were allowed to prove their claim using anecdotal testimony by owners of body shops and some internal State Farm memos criticizing particular non-OEM parts. They were not required to prove that each class member actually received one or more non-OEM parts (as opposed to simply having one specified on a repair estimate),[13] that the particular non-OEM parts used in each class member's repair (if any) were inferior to their OEM counterparts, or that the particular non-OEM parts installed in class members' vehicles failed to restore *any* (much less every) class member's vehicle to its pre-loss condition. Meanwhile, the trial court precluded State Farm from attempting to present individualized defenses, such as waiver

---

[12] For a more complete description of the class certification phase of the case, see Petition for Writ of Certiorari, No. 97-2063, *State Farm Mut. Auto. Ins. Co. v. Speroni* (filed June 22, 1998).

[13] State Farm adduced evidence at trial that, for a variety of reasons, class members often received OEM parts at no extra expense despite the fact that State Farm had specified a non-OEM part on the repair estimate.

and estoppel.[14] The court also prohibited State Farm from adducing testimony from current and former insurance regulators that the use of non-OEM parts was encouraged and/or permitted in their states.

In October 1999, the jury determined that State Farm breached its "contract with the class" by using non-OEM parts and awarded the class $456,636,180 in compensatory damages, despite the admissions of the plaintiffs' damages expert that one component of his damages calculation made no economic sense and that, in estimating the other component, he had ignored various real-world factors that could not be determined on a class-wide basis. The trial court then piled on an additional $130,000,000 in so-called "disgorgement" damages and $600,000,000 in punitive damages under the Illinois Consumer Fraud and Deceptive Business Practices Act. In April 2001, the Illinois Court of Appeals affirmed the trial court's judgment (with the exception of the "disgorgement" damages) in an opinion that gave remarkably short shrift to State Farm's arguments that class treatment was unwarranted because of the fact-specific nature of each claim and the differences in state law governing the claims of non-Illinois class members. *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001).

Not surprisingly, the October 1999 verdict served as a magnet attracting class-action lawyers to southern Illinois. Two southern Illinois counties in particular found themselves the focal point of a flurry of class-action activity, with at least ten consumer class actions filed in the last three months of

---

[14] Many of the class members resided in states whose laws expressly require insurers to obtain the consent of the insured as a condition of using non-OEM parts. See, *e.g.*, Colo. Rev. Stat. Ann. § 42-9-107; Ind. Code § 27-4-1.5-8; N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(5)(ii); Or. Rev. Stat. §§ 746.287(1), 746.292(4)(b); R.I. Gen. Laws 1956 § 27-10.2-2; W. Va. Code § 46A-6B-3.

1999, most of them against out-of-state businesses and on behalf of putative nationwide classes.[15]

4. In short, out-of-state class action defendants have been subjected to procedural unfairness in state courts that would not be tolerated by the federal courts. That trend has been accelerating in recent years. As Congressman Moran put it, "[i]n essence, we have a situation where out of state defendants are being haled into the plaintiffs' state court where they face complex litigation with large sums of money at stake. These are the types of cases for which diversity jurisdiction was created." Moran Testimony, *supra*.

Compounding the failure of some state courts to enforce the statutory and constitutional limitations on class actions is their frequent inability to handle complex, multistate class actions. As one commentator has noted, "many state courts have neither the complex litigation experience nor the support staff necessary to address the complex, technical issues normally presented by class actions." Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) (statement of John W. Martin, Jr.), available at 1998 WL 8993263. More importantly, state courts "lack any mechanism

---

[15] See *Paul v. Country Mut. Ins. Co.*, No. 99-L-995 (Madison County, filed Oct. 13, 1999); *Stone v. SBU, Inc.*, No. 99-L-977 (Madison County, filed Oct. 7, 1999); *Arnold v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-0896 (St. Clair County, filed Oct. 22, 1999); *Strasen v. Allstate Ins. Co.*, No. 99-L-1040 (Madison County, filed Oct. 26, 1999); *Phillips v. Ford Motor Co.*, No. 99-L-1041 (Madison County, filed Oct. 26, 1999); *Hobbs v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-1068 (Madison County, filed Nov. 2, 1999); *Rios v. St. Paul Fire & Marine Ins. Co.*, No. 99-L-1125 (Madison County, filed Nov. 16, 1999); *Capone v General Motors Corp.*, No. 99-L-1127 (Madison County, filed Nov. 17, 1999); *Siler v. State Farm Mut. Ins. Co.*, No. 99-L-863 (Madison County, filed Nov. 30, 1999); *Winn v. Associates First Capital Corp.*, No. 99-L-1227 (Madison County, filed Dec. 23, 1999).

for coordinating parallel litigation," which often results in defendants being forced to expend substantial resources to litigate multiple lawsuits in different courts and potentially gives classes the opportunity for "several bites at the apple against a class action defendant." *Ibid.* By contrast, the federal courts have both the resources to handle large, complex litigation and the means to consolidate related actions, see 28 U.S.C. § 1407, resulting in an efficient use of resources and fairness to a class action defendant.

Given that some state courts are decidedly tilted in favor of class action plaintiffs and against class action defendants, it is no surprise that plaintiffs' lawyers often manipulate the diversity rules to destroy federal jurisdiction. As Judge Nangle, the recently retired chair of the Judicial Panel on Multidistrict Litigation has noted, "a growing trend in class action litigation in this country" is the extent to which plaintiffs' attorneys "carefully craft[] the language in the[ir] petitions or complaints in order to avoid the amount in controversy requirement of the federal courts." *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring). Unfortunately, the Ninth Circuit's opinion in this case provides yet another way for plaintiffs' counsel to game the system simply by selecting as class representatives only those class members whose claims fail to meet the monetary threshold established in Section 1332, while keeping class members with larger claims hidden in the weeds. If Congress intended to expand federal jurisdiction over class action suits when it enacted Section 1367, it could not also have intended that federal jurisdiction be so easily evaded through artful pleading.

5. As we have discussed extensively in this amicus brief, there is a significant class action crisis in this country. Out-of-state corporate defendants frequently find themselves haled into state courts to defend putative class action suits before judges who often do not undertake the thorough review of the propriety of class treatment that is common in the federal courts. These defendants will settle a certified class action suit,

no matter how meritorious, in order to avoid potentially ruinous liability. The compelling interest in ensuring that the engines of the American economy are not subjected to this type of class action extortion in state courts supplies a more than rational reason for Congress to have excluded Rule 23 from the exceptions to supplemental jurisdiction set forth in 28 U.S.C. § 1367(b). As the petition for certiorari cogently explains, this omission evidences Congress's clear intent that under Section 1367 a district court may exercise supplemental jurisdiction over the claims of members of a Rule 23 diversity class action that do not meet the amount-in-controversy requirement of Section 1332 so long as at least one class member does meet that requirement.

The Court has previously granted review of the issue presented by this case — the extent of a district court's supplemental jurisdiction in class action suits. Since an evenly divided Court left the issue unresolved in *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000), the dispute has only deepened among the lower courts. Four federal appellate courts (including the Ninth Circuit) have agreed with petitioner. Three federal appellate courts, despite Section 1367's plain language, have held that each class member must satisfy the amount-in-controversy requirement in Section 1332 for a district court to have federal jurisdiction over the class action. Countless numbers of district courts have also confronted this issue, resulting in a waste of judicial and private resources devoted to the threshold question of whether a particular class action suit belongs in federal court or in state court.

Because "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," 28 U.S.C. § 1447(d), a trial court's decision on whether Section 1367 authorizes it to assert supplemental jurisdiction over class-action claims that do not meet the amount-in-controversy requirement often does not make it to the federal circuit court level, much less to this Court. DaimlerChrysler's petition thus presents a rare opportunity for

the Court to revisit this issue of significant and national import, which has now engendered a clear circuit split and collateral uncertainty among judges and litigants, and to give effect to Congress's intent that class action defendants have a greater opportunity to litigate in federal court. Moreover, this particular case presents the ideal opportunity for the Court to enunciate definitive rules in the area of class action supplemental jurisdiction, because the Ninth Circuit's approach threatens to render Section 1367 a dead letter.[16] Review is warranted to prevent Congress's will from being thwarted in this underhanded manner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

EVAN M. TAGER
Counsel of Record
CHRISTOPHER C. WANG
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

DECEMBER 2001

---

[16] As part of its overall consideration of the case, the Court should also review the Ninth Circuit's interconnected holding that punitive damages cannot be aggregated and attributed to each member of a class action (or, alternatively, to the class representatives) for purposes of the amount-in-controversy requirement. Guidance on this issue would be extremely valuable to both courts and litigants.